IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-958

CITY OF FAIRFAX, VIRGINIA,
Petitioner,

v.

WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY, *et al.*
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The petitioner, City of Fairfax, Virginia, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on September 19, 1978. This proceeding concerns an action instituted by the petitioner, City of Fairfax, Virginia, against the respondents, Washington Metropolitan Area Transit Authority, Washington Suburban Transit District, District of Columbia, Arlington County, Virginia, Fairfax County, Virginia, City of Falls Church, Virginia, Montgomery County, Maryland, Prince George's County, Maryland, and others. The case presents important issues relative to the financing and construction of regional rapid rail mass transit systems.

Throughout this petition, citations are made to the appendices containing the trial record filed with the United States Court of Appeals for the Fourth Circuit. The Joint Appendix is referred to as "TR at ——." The Exhibit Volume of the Joint Appendix is referred to as "TR Exh. at ——."

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 582 F.2d 1321 (4th Cir. 1978) and appears in the Appendix hereto at 1a. The opinion of the United States District Court for the Eastern District of Virginia on the issue of liability appears in the Appendix hereto at 29a. The opinion of the United States District Court for the Eastern District of Virginia on the issue of damages appears in the Appendix hereto at 43a. Neither opinion of the United States District Court for the Eastern District of Virginia is reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on September 19, 1978, and this petition for writ of certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. section 1254(1) (1970).

QUESTIONS PRESENTED

1. Whether certain parties to a contract for the construction of a regional rapid rail mass transit system pursuant to an interstate compact may breach the contract and avoid restitution of funds paid to them pursuant to the contract if they are unable to determine what, if any, Federal financial assistance may be available for such construction.

2. Whether certain parties to a contract for the construction of a regional rapid rail mass transit system pursuant to an interstate compact, who deliberately rendered impossible the performance of the contract according to its terms, have breached the contract if such transit system might be constructed in some manner at any time in the future.

STATUTORY PROVISIONS INVOLVED

Washington Metropolitan Area Transit Authority Compact, Pub. L. 89-774, 80 Stat. 1324 (1966), is reproduced in the Appendix hereto at 48a.

National Capital Transportation Act of 1969, as amended, Pub. L. 91-143, 83 Stat. 320 (1969); Pub. L. 92-349, 86 Stat. 464 (1972); Pub. L. 92-517, 86 Stat. 1004 (1972), is reproduced in the Appendix hereto at 104a.

STATEMENT OF THE CASE

This proceeding arises out of a 1970 Capital Contributions Agreement between the petitioner, City of Fairfax, Virginia ("City"), and the respondents, Washington Metropolitan Area Transit Authority ("WMATA"), Washington Suburban Transit District, District of Columbia, Arlington County, Virginia, Fairfax County, Virginia, City of Alexandria, Virginia, City of Falls Church, Virginia, Montgomery County, Maryland and Prince George's County, Maryland. TR Exh. at 306-24. The purpose of the Capital Contributions Agreement was to finance and construct a regional rapid rail mass transit system known as the Adopted Regional System—1968 (Revised). TR Exh. at 1-59. Pursuant to the Capital Contributions Agreement, the City and the other political subdivisions were to contribute certain funds to WMATA,

which WMATA agreed to employ, together with specified federal funding and revenue bonds, to

> proceed with all practical dispatch to construct and acquire the regional transit system substantially in accordance with Adopted Regional System—1968 (Revised), as the same may hereafter from time to time be altered, revised or amended . . . . TR Exh. at 309-10.

The Capital Contributions Agreement further provided that

> No such revision, alteration or amendment which would reduce the facilities to be constructed in accordance with the Adopted Regional System—1968 (Revised) within any Political Subdivision (or in the case of the City of Fairfax and the City of Falls Church, reduce the facilities serving such Political Subdivision) shall be adopted without the consent of such Political Subdivision. TR Exh. at 310.

The Adopted Regional System consists of a number of routes, each of which has been described by a letter designation. The only facility serving the City is the K Route (also known as the "Vienna line"), which begins in Rosslyn, Virginia, and terminates at Nutley Road near Vienna, Virginia, approximately three-quarters of a mile from the boundaries of the City. This route was to be constructed below ground between Rosslyn, Virginia, and Glebe Road, in Arlington County, Virginia, at which point it was to enter the median of the proposed Interstate Route 66 and was to continue westward on the surface in the median to its terminus at Nutley Road. TR Exh. at 16. It was to be in operation at Nutley Road prior to June 30, 1978. TR Exh. at 17.

In 1969, Congress authorized the Secretary of Transportation to make annual contributions to WMATA "[t]o provide the Federal share of the cost of the Adopted Regional System." Appendix at 105a. The appropriations

act expressly provided that these contributions were "not to exceed the lower amount of $1,147,044,000 or two-thirds of the net project cost of the Adopted Regional System." *Id.* The financial plan adopted as a part of the Adopted Regional System—1968 (Revised) (TR Exh. at 19-21) and the Capital Contributions Agreement (TR Exh. at 307-08, 318) both expressly recognized this limited Federal participation. The remaining net project costs were to be generated from an issue of revenue bonds and the local contributions of the political subdivisions which were parties to the Capital Contributions Agreement.

Under the Capital Contributions Agreement, WMATA was charged with the responsibility to recompute the capital contributions required from each political subdivision on December 9, 1974, December 9, 1976, and every two years thereafter to assure the availability of funds to finance project costs. TR Exh. at 311-12. WMATA has failed to make any such recomputation prior to or during the pendency of this litigation. TR at 470-71, 491.

By late 1974, it became apparent that there were increasingly serious financial problems within WMATA. Not only had the estimated construction costs risen to $4.5 billion from the original estimate of $2.5 billion, but the escalation in costs began to have a serious impact upon the ongoing construction program. TR at 172, 335-36, 461. Thus, although WMATA had received all federal appropriations originally contemplated under the Capital Contributions Agreement, it began to investigate additional sources of funding, including the transfer of Interstate Highway funds for its use. TR at 613. *See generally* TR at 620-39.

Notwithstanding the potential transfer of Interstate Highway funds, evidence before the District Court estab-

lished that even if all available Interstate Highway funds were transferred to WMATA and all contemplated additional local contributions were made, there would be a shortfall in the financing of the Adopted Regional System—1968 (Revised) of between $40 million and $300 million. TR at 649-51; TR Exh. at 93. This estimated shortfall has increased substantially since that date. *See* Correspondence dated November 21, 1977, from the Honorable Brock Adams, Secretary of the United States Department of Transportation, to Francis W. White, Chairman of the Board of Directors of WMATA, filed on or about June 14, 1978, with the United States Court of Appeals for the Fourth Circuit as a part of "Response of Appellee and Request for Judicial Notice."

After one successful application for the transfer of such Interstate Highway funds, representatives of WMATA, the District of Columbia and Maryland began to meet in early 1976 to consider a second package of Interstate Highway funds to be transferred, known as the "B" package. *See generally* TR at 495-505. Although Maryland participated in the selection of contracts to be funded pursuant to the "B" package, the only Interstate Highway funds which were to be transferred from Maryland were conditioned upon an extension of a rapid rail transit route serving Montgomery County, Maryland, designated as the A Route, beyond its original terminus contemplated in the Adopted Regional System. TR at 557-61.

In order "to achieve essentially equitable treatment of each of the jurisdictions as monies became available and work was accomplished", the Adopted Regional System—1968 (Revised) incorporated a design and construction schedule establishing priorities for the letting of the various contracts necessary to complete the system. TR at 184. *Accord*, TR at 447-49, 492-93; TR Exh. at 60-61. *See* TR Exh. at 17. *See also* TR Exh. at 67-90. Although

the A Route construction included in the "B" package at Maryland's request was substantially in advance of its scheduled priority, WMATA attempted to avoid any adverse impact upon its adopted design and construction schedule by not funding the finishing work for approximately one-half of the A Route. TR at 495-98. Thus, the last half of the line would not be operational and completion could be delayed until its proper operational phase. TR at 502-03.

Throughout this period, the construction of Interstate Route 66 was delayed by a series of legal actions not otherwise connected with this litigation. Notwithstanding the pending lawsuits, the initial "B" package included funds necessary to complete the K Route to operational status from Rosslyn, Virginia, to Glebe Road, and for design and land acquisition west of Glebe Road along the right of way of Interstate Route 66. TR at 496-97. Representatives of the Federal government indicated that there was no reservation concerning the financing of the K Route construction west of Glebe Road prior to the inclusion of the route in the Alternatives Analysis in the fall of 1976. TR at 695, 696. *See also* TR at 343.

Subsequent to the development of the initial "B" package, Maryland, which funded all contributions of local Maryland jurisdictions, indicated that it would not agree to fund the "B" package unless the contracts necessary to construct the A Route to operational status along its entire length were included. TR at 557. *See also* TR at 548-49. Maryland's position is set forth in the Recommended FY 77-82 Montgomery County Capital Improvement Program, January 1, 1976.

> METRO construction in the Maryland jurisdictions lags far behind that in the District of Columbia and Virginia. According to the current schedule, Maryland will fall still further behind in the next

few years as construction progress continues to be concentrated in the District of Columbia and Arlington County. Thus, if financial constraints force a curtailment of the METRO system, the bulk of the impact will be within Montgomery and Prince George's Counties, and, to a lesser extent Fairfax County. To protect against such an occurrence the State of Maryland has established a policy that no additional State money will be contributed to the Metrorail capital program until additional construction contracts in Maryland have been let. TR Exh. at 162.

As soon as the "B" package was presented to the Board of Directors of WMATA for approval, the Virginia jurisdictions began to review the contracts to be funded under that arrangement. In particular, the City of Alexandria, Virginia, became quite concerned that the C Route passing through Alexandria was not brought to operational status south of the City limits and it recommended that

> all funding now indicated in the Part B package for J-2, the H route, and undesigned sections of the B, K, and E route be reprogrammed to lines or sections of lines which can be practically operated (these funds appear to total in excess of $42 million). TR Exh. at 111.

Before Alexandria could act relative to that recommendation, the Washington Suburban Transit Commission promulgated a draft agreement to be executed between it and WMATA, conditioning the payments to be made on behalf of the Maryland jurisdictions under the "B" package upon the award of certain A Route contracts by a time certain. TR at 426-28. Upon learning of the same, Fairfax County refused to make its required local contribution, and the other Northern Virginia jurisdictions concurred. TR at 732-33. *See also* TR at 144-46, 150-51.

As a result of the collapse of the financial arrangements for funding the "B" package, the defendants began to meet and negotiate another agreement through which the "B" package might be altered and subsequently funded. *See* TR Exh. at 99-104, 118, 271-83. This Agreement was described as an "Interim Capital Contributions Agreement." At about the same time, the Federal government required a study of transportation alternatives to certain of the proposed rapid rail routes, known as the Alternatives Analysis, prior to funding the construction of such routes through the transfer of Interstate Highway funds. TR Exh. at 407-13. The K Route was not one of the routes mandated for study by the Federal government. *Id.* It was, however, made a part of the Alternatives Analysis pursuant to the request of the defendant local political subdivisions. TR Exh. at 414-15.

On October 20, 1976, WMATA began to circulate a draft Interim Capital Contributions Agreement. TR Exh. at 271-283. This Agreement included the City as a party and contained provisions completing the A Route and eliminating all funds for construction of the K Route west of Glebe Road in Arlington County, a point approximately twelve miles from the border of the City. *See* TR Exh. at 274, 275-80. On November 16, 1976, the City adopted a resolution opposing the truncation of the K Route and objecting to any alternative analysis of that route. TR Exh. at 119-20. In response to the City's action, the Interim Capital Contributions Agreement was revised and the City was deleted as a party. TR Exh. at 121-39.

During the negotiation of the Interim Capital Contributions Agreement, Fairfax County insisted upon and received a paragraph exonerating it from further liability. TR at 159. Arlington County joined in that request, and both, by resolution, conditioned further contributions on the inclusion of the said paragraph in the proposed Interim Capital Contributions Agreement. *See* TR at 300-01.

This paragraph was incorporated into the Interim Capital Contributions Agreement as paragraph number 3, and provided,

> No signatory of this Agreement shall be obligated to fund construction not included in this Agreement or to pay in excess of the amounts specified above, except for interest penalties in accordance with Paragraph 1 above. Funding of additional construction beyond that covered in this Agreement shall be dependent upon the adoption of a financial plan and a new or revised Capital Contributions Agreement. TR Exh. at 123.

On December 2, 1976, the Board of Directors of WMATA approved the Interim Capital Contributions Agreement and authorized its general manager to execute the same. TR Exh. at 140-43. On December 10, 1976, the Montgomery County Council approved the Interim Capital Contributions Agreement. TR Exh. at 247-66. On December 18, 1976, the Arlington County Board approved the Interim Capital Contributions Agreement and authorized its Chairman to execute the same. TR Exh. at 237. On December 21, 1976, the Prince George's County Council approved the Interim Capital Contributions Agreement and authorized its execution; however, the Council also authorized its Office of Law to alter the language of paragraph number 3 to indicate that there was no abridgement of the Capital Contributions Agreement. TR Exh. at 268. The Mayor of the District of Columbia filed with the District Court an affidavit dated December 30, 1976, indicating that he intended to sign the Interim Capital Contributions Agreement. Defendants' Joint Answer, Exhibit 4.

On January 6, 1977, expressly responding to the instant litigation, the WMATA Board voted to delete paragraph number 3 from the Interim Capital Contributions Agreement. Defendants' Exhibit I. Thereafter, all of the local

political subdivisions which had approved the original version approved the amendment. TR Exh. at 238-39, 240, 269-70. In addition, the remaining jurisdictions approved the amended version. It should be noted, however, that Fairfax County limited such approval to purposes substantially similar to those contained in the deleted paragraph, that is, to

> permit WMATA's construction program to proceed on an uninterrupted path during the time that would be required to address completing the Adopted Regional System, once alternative analyses were done and to develop and adopt an updated financial plan and a new or revised Capital Contributions Agreement. TR Exh. at 467.

The Interim Capital Contributions Agreement exhausts all interest earned by WMATA on previous contributions to it. TR at 505-08; TR Exh. at 144-45. It depletes all commitments of the signatories to the Capital Contributions Agreement. TR at 162-66, 238-39. It represents a reaction of the defendants to what they believed to be a collapse of the Capital Contributions Agreement. TR at 172, 460-61. It accelerates construction of certain routes ahead of the K Route, contrary to the design and construction schedule. *Compare* TR Exh. at 67-90 *with* TR Exh. at 121-39. Upon implementation of the Interim Capital Contributions Agreement, WMATA has no further commitments of funds with which to construct the Adopted Regional System—1968 (Revised). TR at 654.

The local political subdivisions which are parties to the Capital Contributions Agreement have no available funds after the Interim Capital Contributions Agreement and are unwilling to commit additional funds absent the adoption of a new financial plan and/or a new Capital Contributions Agreement. The intent of the various jurisdictions was best expressed by the Memorandum of Douglas Harman,

City Manager of the City of Alexandria, dated December 10, 1976, wherein it is stated,

> At present, it is impossible to predict the ultimate extent of the system, the total cost, what, if any, additional agreements may be forthcoming, and how and in what amounts additional local contributions might be allocated. It was clearly the intent of those who worked to prepare the proposed Interim Capital Contributions Agreement to provide for a fixed payment by each jurisdiction to complete a specific portion of the 100 mile system. Moreover, the intent of the proposed agreement is that, upon completion of the fixed payment, each jurisdiction would have fulfilled all of its legally binding commitments under all existing rail capital contributions agreements, and any further payments would be dependent upon execution of a subsequent agreement or amendment of the existing Capital Contributions Agreement. TR Exh. at 177.

Accord, Maryland jurisdictions: TR at 266-67, 548-56; TR Exh. at 154-60, 161-73; District of Columbia: TR at 215-17; Arlington County: TR Exh. at 460-61; Fairfax County: TR at 238-39; TR Exh. at 174.

On December 13, 1976, the City instituted the instant action in the United States District Court for the Eastern District of Virginia against WMATA, the local political subdivisions and others, seeking injunctive relief, or, in the alternative, damages for breach of the Capital Contributions Agreement. Subject matter jurisdiction of the District Court was premised upon 28 U.S.C. section 1331 (1970) and section 81 of the Washington Metropolitan Area Transit Authority Compact. Appendix at 97a. *See also* Appendix at 101a-102a.

After extensive pretrial discovery, the issue of liability was tried before the District Court on February 1, 2, 3 and 7, 1977. On February 25, 1977, the District Court

issued a memorandum opinion and order finding that the defendants had breached the Capital Contributions Agreement. Appendix at 29a-42a. The District Court held that the defendants had

> rather effectively circumvented, altered and/or modified the construction, financing and recomputations of the original capital contributions agreement.
>
> By so doing they have subjected themselves to the penalties flowing from the breaches of the agreement. Appendix at 41a.

On May 17, 1977, the issue of damages was tried before the District Court. On May 27, 1977, the District Court issued a memorandum opinion and order awarding the City judgment against the defendants in the amount of $1,990,859.92, with interest from December 2, 1976, until paid. Appendix at 43a-47a.

The judgment rendered by the District Court in the City's favor was reversed by the Court of Appeals on the grounds that there was no breach of the Capital Contributions Agreement, contrary to the findings of the District Court, and, therefore, that the instant action was premature. Appendix at 1a-28a.

REASONS FOR GRANTING THE WRIT

I. The decision below raises significant and recurring problems concerning the role of the Federal government in financing regional mass transit facilities.

The rapid rail mass transit system planned for the Washington metropolitan region is only one of a number of such systems in operation, under construction, or proposed for the major urban areas of the United States. *See* W. Owen, *Transportation for Cities: The Role of Federal Policy* at 22-30 (1976); U.S. Department of Transportation, *1974 Transportation Report* at 218, Fig-

ure V-26 (1975). From 1972 to 1990, it is anticipated that the Federal government will expend $41.0 billion upon the capital costs of regional rapid rail transit systems. U.S. Department of Transportation, *1974 Transportation Report* at 169 (1975). These amounts will be spent during a time when transportation experts are seriously questioning the ability of any region to support such a transit system. *See, e.g.*, A. Hamer, *The Selling of Rapid Rail Transit: A Critical Look at Urban Transportation Planning* (1976); W. Owen, *Transportation for Cities: The Role of Federal Policy* (1976). Thus, the consideration which the courts give to the role of the Federal government in the financing of such systems will have a significant impact upon Federal financial policies, the local governments which comprise a metropolitan region, their citizens, and the character of urban mass transportation in the nation as a whole.

In the instant case, it is submitted that the role of the Federal government as perceived by the Court of Appeals, and the importance which the Court of Appeals attaches to that role, is contrary to established principles of contract law, and would have a deleterious effect upon the viability and reliability of regional transit agreements and most contracts relating to matters as to which any form of Federal assistance might be available to the parties.

It is important to note initially that WMATA received *all* Federal funds contemplated in the Capital Contributions Agreement. These funds, appropriated in 1969, were never in issue. *See* Appendix at 104a-109a. Rather, the Federal participation which concerned the Court of Appeals was the potential for additional Federal funding through the transfer of Interstate Highway funds or some other Federal program. Such funds were completely outside of the initial financial plan implemented through the Capital Contributions Agreement.

The Court of Appeals recognized that the Capital Contributions Agreement provided an internal mechanism to meet the problem of cost escalations through recomputation of the contributions required from the parties. Appendix at 8a. Yet, notwithstanding the failure of WMATA to perform such recomputations as required, the Court of Appeals declared that the exhaustion of funds confronted WMATA

> with the problem of devising a new or revised financing plan in order to keep the project going and to avoid costly delays in the orderly prosecution of the project. The most important problem in connection with such financing plan was the federal support for the project . . . . Appendix at 9a.

In its analysis of WMATA's admitted failure to comply with the Capital Contributions Agreement in not recomputing the contributions required of the parties, the Court of Appeals stated

> It would accordingly have been an entirely futile exercise to compute and demand contributions from local jurisdictions until the Authority knew the federal contribution was available. Moreover, any computation prior to this knowledge would have been useless, since between its preparation and the time when the federal contribution might be assured, construction costs, interest charges, and demographic changes in the various parts of the zone to be served would have changed, invalidating completely any earlier computation of costs and anticipated revenue. Appendix at 25a.

It should be noted that the Court of Appeals ignores the fact that the Capital Contributions Agreement contemplated that any such recomputation would only be an estimate and thus provided for its adjustment every two years. *See*

Capital Contributions Agreement, § 3.3(d), TR Exh. at 312. Thus, the Court of Appeals held that the inability to determine what, if any, potential Federal assistance *may* be available for the construction of a regional transit system excuses the breach of express contract terms intended to assure the financial viability of that construction. This reformation of the Capital Contributions Agreement through a doctrine of impossibility by reason of indeterminate Federal assistance is unprecedented and contrary to basic tenets of contract law.

The doctrine created by the Court of Appeals unsettles existing contractual relationships and has a chilling effect upon future contracts where there may exist potential Federal assistance. The doctrine will deter potential contractors from entering into agreements with those to whom Federal assistance may become available, as one who seeks assistance may default, and, if unable to determine what, if any, Federal assistance may be available to it, may retain the benefit of the other's performance. As a result, those who seek Federal assistance will be required to accept contracts which bear an extraordinary risk premium. These contractual inhibitions will hinder the Federal government in carrying out its assistance programs. Thus, the ultimate cost of the doctrine will be borne by those whom, as a policy matter, the Federal government has determined to be worthy of assistance.

Although there are numerous examples, the most graphic demonstration of the impact of the decision below is the financial crisis which struck the City of New York. In 1975, New York represented to Congress that, in the absence of Federal assistance, it would be forced to default upon approximately $2.5 billion in short-term obligations between December 1, 1975, and June 30, 1976. 2 U.S. Code Cong. & Ad. News 1510 (1975). Had Congress not made commitments for such assistance, New York would have

been unable to pay its obligations. *See* New York City Seasonal Financing Act of 1975, Pub. L. 94-143, 89 Stat. 797 (1975). If default had occurred and the doctrine created in the decision below were applied, claims for payments of New York's obligations would have been denied. The doctrine requires such a denial if the Court determined that New York intended to pay the claims; that New York was unable to ascertain what, if any, Federal assistance might become available to it; and that New York might pay the claims in some manner at any time in the future. It appears clear that this interference with contractual obligations, entered into before and without contemplation of the requested Federal assistance, is plainly wrong. The parties to affected contracts certainly do not contemplate such a result and there exists no reasonable basis for the Court of Appeals to impose it upon them. In the instant case, the Capital Contributions Agreement was entered into before and did not contemplate the Federal assistance with which the Court of Appeals was concerned. Thus, the Capital Contributions Agreement should not be altered by the application of the erroneous doctrine created by the Court of Appeals.

Finally, if the defendants' default is to be excused by such a doctrine of impossibility, it is well settled that discharge of a duty by reason of impossibility requires restitution to the other party of amounts which he has paid for that performance. 6 A. Corbin, *Contracts* §§ 1321, 1367-1369 (1962). *See, e.g.*, West Los Angeles Institute for Cancer Research v. Mayer, 366 F.2d 220 (9th Cir. 1966); Sokoloff v. National City Bank, 208 App. Div. 627, 204 N.Y.S. 69 (1924). *See also* 17 Am. Jur. 2d, *Contracts* § 424 (1964). Thus, even if the analysis of the Court of Appeals is considered correct, the remedy of restitution granted to the City by the District Court was a proper remedy.

II. Decision below conflicts with the reasoning in the applicable decisions of this Court.

The Court of Appeals relied heavily upon the case of *Dingley v. Oler*, 117 U.S. 490 (1886), in its analysis of the anticipatory breach of contract in the instant litigation. In fact, the Court of Appeals based a substantial part of its holding upon a single sentence of the *Dingley* opinion in which this Court stated, after examining the repudiation to which the plaintiff objected, that

> This, we think, is very far from being a positive, unconditional and unequivocal declaration of fixed purpose not to perform the contract in any event or at any time. 117 U.S. at 502.

See Appendix at 12a-13a. The Court of Appeals repeatedly cites this sentence in support of its holding that

> the very essence of the plaintiff's right of action is that either the defendants have unequivocally repudiated any intention "at any time" to construct such a system with Route K included or have so completely disqualified themselves voluntarily that they cannot construct such a system. Appendix at 23a.

See also citations to *Dingley v. Oler, supra*, Appendix at 12a, 14a, 15a. It is submitted that the holding of the Court of Appeals misinterprets this Court's decision in *Dingley v. Oler, supra*, in a manner which vitiates the doctrine of anticipatory breach and conflicts with this Court's later decisions adopting that doctrine. *See* Roehm v. Horst, 178 U.S. 1 (1900). *See also* New York Life Ins. Co. v. Viglas, 297 U.S. 672 (1936); Mobley v. New York Life Ins. Co., 295 U.S. 632 (1935); Central Trust Co. v. Chicago Auditorium Ass'n, 240 U.S. 581 (1916).

The Court of Appeals interprets the quoted statement in *Dingley* to establish a rule of law that repudiation of a contract must deny the intention to perform at "any time." Therefore, the Court of Appeals finds not only that time

was not of the essence in the Capital Contributions Agreement, but that time was not a factor at all, contrary to the express concerns for timely performance in the Agreement. The statement in question referred to the terms of the particular contract under consideration in *Dingley*. That case concerned a dispute between the owners of two ice houses as to the promised delivery of ice. Oler, as an accommodation to Dingley, stored ice for Dingley which Dingley was unable to store. As a part of the agreement, Oler was to return the ice to Dingley during the next season. In the next year the price of ice increased from 50 cents per ton to $5.00 per ton and Oler declined to ship the ice to Dingley. Dingley sued, claiming anticipatory breach. This Court interpreted the agreement between the parties as follows,

> The defendants . . . had the right under the terms of the contract to consult their convenience as to the particular day when they would furnish to the plaintiffs the ice for shipment. The first and principal act to be done under the contract was to be done by the defendants, that is, the delivery, and the words of the agreement are fully satisfied when that is done at any reasonable time within the season of 1880. And this confers upon the defendants, bound to make the delivery, the choice of the time within the period permitted by the contract. 117 U.S. at 501.

This Court held that the case was brought prematurely as Oler's refusal to deliver "amounted merely to a refusal to comply with the particular demand then made for immediate delivery." 117 U.S. at 504. This Court indicated that a repudiation must go to the terms of the contract itself, which permitted delivery "at any reasonable time within the season," and that the refusal to deliver immediately was not a refusal to deliver "at any time." Thus, it is apparent that the sentence relied upon by the Court of Appeals does not establish a rule of law but refers to the express performance provisions of the contract in question.

The proper rule, previously established by this Court, provides that

> Repudiation by one party, to be sufficient in any case to entitle the other to treat the contract as absolutely and finally broken and to recover damages as upon total breach, must at least amount to an unqualified refusal, or declaration of inability, *substantially to perform according to the terms of his obligation.* Mobley v. New York Life Ins. Co., 295 U.S. 632, 638 (1935) (emphasis added).

Accord, Roehm v. Horst, 178 U.S. 1 (1900); Restatement of Contracts § 318 (1932). Thus, in the instant case, the test to be applied was not whether the defendants had repudiated an intention to construct the K Route "at any time"; rather, it was whether the defendants had repudiated an intention to construct the K Route pursuant to the terms of the Capital Contributions Agreement.

Repudiation may be shown either through renunciation of one's contract obligations or through deliberately placing oneself in a position which renders substantial performance of one's contractual duties impossible. Roehm v. Horst, 178 U.S. 1 (1900). In the instant case, the Court of Appeals, applying the standard which it erroneously inferred from *Dingley*, held that neither situation existed, contrary to the findings of the District Court. It is submitted, however, that application of the proper standard to the facts in this case clearly supports the conclusions of the District Court.

The Court of Appeals held that a clear and unequivocal renunciation of the Capital Contributions Agreement, such as that contained in paragraph number 3 of the Interim Capital Contributions Agreement, was not effective as a repudiation unless it is ultimately incorporated into a final and binding contract between the repudiating parties. *See*

Appendix at 20a- 21a. This is not the proper test of repudiation. *See* Roehm v. Horst, 178 U.S. 1 (1900). Moreover, it disregards the fact that WMATA, Arlington County, the District of Columbia, Montgomery County and Prince George's County all *approved* and authorized their chief executive officers to sign the Interim Capital Contributions Agreement containing paragraph number 3. TR Exh. at 140-43, 237, 247-66, 268; Defendants' Joint Answer, Exhibit 4. At that point, execution of the Agreement was no more than a ministerial act and whether it was actually carried out did not affect the approval of the document. 56 Am. Jur. 2d, *Municipal Corporations* § 496 (1971). The Court of Appeals points to the conditional approval of Prince George's County as "typical." Appendix at 18a-19a. *But see* Appendix at 10a-11a; TR Exh. at 247-66. However, no other jurisdiction expressed such conditions and those stated by Prince George's County came after the instant litigation was filed. The erroneous requirement by the Court of Appeals of a final and binding contract to constitute repudiation also leads the Court of Appeals to disregard both case law denying the ability of the defendants to revoke the repudiation and subsequent statements affirming the repudiation contained in paragraph number 3, notwithstanding the revision of the document. Appendix at 19a-21a. *See* TR at 135-37, 159-60, 587, 593, 595, 654, 682; TR Exh. at 177-79.

In addition, the narrow focus of the Court of Appeals upon the post-litigation deletion of paragraph number 3 results in its ignoring the fact that the Interim Capital Contributions Agreement, with or without paragraph number 3, constituted a material alteration of the Capital Contributions Agreement, without the consent and over the objection of the City. The Interim Capital Contributions Agreement depletes all commitments of the parties to the Capital Contributions Agreement. TR at 162-66, 238-39. It expends all

interest earned by WMATA on such contributions, including the money paid to WMATA by the City. TR at 505-08. It accelerates the construction of a number of routes ahead of the K Route, contrary to the design and construction schedule which is a part of the Adopted Regional System—1968 (Revised). *Compare* TR Exh. at 67-90 *with* TR Exh. at 121-39. It is well settled that

> A modification of a contract requires the assent of both, or all, parties to the contract. Mutual assent is as much a requisite element in effecting a contractual modification as it is in the initial creation of a contract. 17 Am. Jur. 2d, *Contracts* § 465 (1964).

Where a party to one contract enters into a second contract concerning substantially the same subject matter, the first contract is repudiated and breached. General Sprinkler Corp. v. Loris Indus. Developers, Inc., 271 F. Supp. 551 (D.S.C. 1967). *Accord*, Precision Dynamics Corp. v. American Hosp. Supply Corp., 241 F. Supp. 436 (S.D. Cal. 1965); Schwartz v. United States, 65 F. Supp. 391 (Ct. Cl. 1946); Agostini v. Consolvo, 154 Va. 203, 153 S.E. 676 (1930). Thus, it is clear that the objective evidence of repudiation is present irrespective of paragraph number 3.

Secondly, the Court of Appeals holds that the present financial inability of the defendants to construct the K Route and their total lack of any further funding commitment is not a repudiation of the contract because it cannot be assumed "that the parties will never enter into another Plan to finance the construction of that part of Route K which was deferred in the Interim Plan." Appendix at 21a. This is not the proper legal standard and is generated from the misinterpretation by the Court of Appeals of *Dingley v. Oler, supra.* It is not a question of whether there will ever be a further agreement in addition to the Capital Contributions Agreement; rather it is whether the defendants have done any voluntary act

which renders substantial performance of their duties under the Capital Contributions Agreement impossible or apparently impossible. *See* Restatement of Contracts § 318(c) (1932). It is clear that the failure to recompute the contributions, as was required to generate additional funds, and the exhaustion of all existing funds available under the Capital Contributions Agreement has rendered performance of that Agreement impossible. To declare the City's action to be premature because the defendants have the capacity to contract further in the future if they so desire renders the doctrine of anticipatory breach a nullity.

It is therefore submitted that the decision below so misconstrues and misapplies the doctrine of anticipatory breach as set forth in the applicable decisions of this Court that it impairs the ability of contracting parties to rely upon previous precedent and unsettles contract rights in general. Thus, it is important that this Court review the decision below to prevent the establishment of a precedent vitiating the doctrine of anticipatory breach.

III. The decision below departs from accepted standards of appellate review.

The Court of Appeals, in reversing the decision of the District Court, held that,

> There has thus been no anticipatory breach of [the Capital Contributions Agreement] by the defendants, authorizing a suit to recover damages for such "total breach." The findings of the District Court to the contrary were clearly erroneous. Appendix at 27a.

This statement, without citation to the record or the particular findings in question, represents the only recognition by the Court of Appeals of the standard of appellate review established in Rule 52(a) of the Federal Rules of Civil Procedure. Notwithstanding the holding of the Court of Appeals, it is clear that

> In relation to the District Court's findings [this Court] stand[s] in review in the same position as the Court of Appeals. The question, therefore, is whether the findings of the District Court were clearly erroneous. McAllister v. United States, 348 U.S. 19, 20-21 (1954).

In the instant case, the Court of Appeals has significantly departed from the accepted standards of appellate review. In particular, the Court of Appeals has based substantial portions of its decision upon two factual conclusions which were plainly wrong and which conflicted with the findings of the District Court and the undisputed facts acknowledged by the parties. It is submitted that such action merits the exercise of the supervisory powers of this Court.

The Court of Appeals found that

> The Administrator of the Urban Mass Transportation Administration, in order to make these increased Highway Trust funds available for the construction of certain parts of the proposed system, demanded that some parts of the system be deferred until an alternatives analysis study was completed for the purpose of determining whether another mode of transportation would be more cost effective for the corridors to be served by certain parts of the routes which included Route K from Glebe Road to Nutley Road Station. Appendix at 9a.

Based upon this conclusion, the Court of Appeals held that the defendants were relieved from liability for failing to recompute the financial contributions required from the parties under the Capital Contributions Agreement and for re-ordering the priorities of construction under the Capital Contributions Agreement by deferring construction of the K Route and accelerating construction of other lines. Appendix at 9a, 23a-25a, 27a.

In fact, the Administrator of the Urban Mass Transportation Administration demanded an Alternatives Analysis of Routes J, H, B and F. TR Exh. at 407-13. The K Route was added to those routes required to be studied on the motion of the Chairman of the Fairfax County Board of Supervisors, at the local level, which was supported by the remaining defendant jurisdictions. TR Exh. at 414-16. Secondly, no Alternatves Analysis of any sort was required prior to September 24, 1976, the date of the Administrator's demand. TR Exh. at 407-13. There is no dispute between the parties in this regard. *See* Brief for Appellants at 9, n.5; Brief of Appellee at 33-34.

Thus, it is clear that a 1976 demand for Alternatives Analysis would in no way impede a recomputation required to be made in 1974, and a demand to analyze routes other than the K Route could not affect the construction or funding of the K Route. Under the analysis of the Court of Appeals, the defendant political subdivisions are permitted to avoid the consequences of their admitted failures to comply with the Capital Contributions Agreement by deliberately impeding the availability of additional Federal funding for the K Route by placing it with the other routes which the Federal government required to be studied. This is expressly contrary to the general rule that

> Where the obligations arising under a contract have attached, and subsequent thereto one party, without the consent of the other does some act or makes some new arrangement which prevents the carrying out of the contract according to its terms, he cannot avail himself of this conduct to avoid his liability to the other party. Baumer v. Franklin County Distilling Co., 135 F.2d 384, 389 (6th Cir.), *cert. denied*, 320 U.S. 750 (1943).

It is submitted that the better analysis of the inclusion of the K Route as a part of the Alternatives Analysis is that of the District Court, which held,

> [T]he alternatives analyses now being considered strongly suggest that some or all of the unfinished

routes might be truncated for lack of sufficient moneys to complete them.

* * * *

If all of the local jurisdictions are as firmly committed to complete the system as they would have the City of Fairfax believe, there is no need or justification for making the alternatives analyses studies. Appendix at 39a-40a.

The second erroneous factual conclusion of the Court of Appeals is that "any construction of Route K beyond Glebe Road was impossible because of the unavailability of a right-of-way in the median of the proposed Interstate 66 along which the rail line was to run from Glebe Road to Nutley Road Station." Appendix at 9a. Based upon this conclusion, the Court of Appeals expressly condoned the alteration of construction priorities contrary to the design and construction schedule. Appendix at 25a-27a.

Notwithstanding the conclusion of the Court of Appeals, the real property upon which the median of Interstate 66 is to be located will be available to WMATA irrespective of the construction of that highway. The State of Virginia had acquired more than 84.4 percent of this right-of-way as early as 1968. TR Exh. at 330. Under Virginia law, even if the highway were not built, this right-of-way would be available to WMATA for the K Route. Va. Code Ann. § 33.1-90.2 (1976 Repl. Vol.). *See* TR Exh. at 356-57. Moreover, WMATA has the power of eminent domain to acquire that which is otherwise not available. Appendix at 97a-98a. WMATA had completed approximately 98 percent of its design of the K Route west of Glebe Road at the time of the trial. TR at 497. Thus, the litigation concerning Interstate 66 did *not* constitute an impediment to construction of the K Route.

This analysis is confirmed by the fact that the original "B" package negotiated between WMATA, the District

of Columbia, and Maryland included $7,901,000 for design and right-of-way acquisition relating to the K Route west of Glebe Road. TR at 497-98; TR Exh. at 115. These funds were allocated to the other routes accelerated ahead of the K Route in the negotiation of the Interim Capital Contribution Agreement. *Compare* TR Exh. at 271-283 *with* TR Exh. at 121-39 *and* TR Exh. at 284-302. Contrary to the finding of the Court of Appeals, there was absolutely no impediment to the expenditure of these funds for the K Route until the defendants voluntarily included the K Route in the Alternatives Analysis study. *See* TR at 695, 696. *See also* TR at 343.

Although the defendants argue that major construction projects on the K Route west of Glebe Road were inadvisable in light of the disputes concerning Interstate 66 (Brief for Appellants at 11), they do not dispute that expenditures for design and land acquisition were proper. Indeed, they point to certain of these expenditures contained in the Interim Capital Contributions Agreement and to WMATA's design coordination with the Virginia Department of Highways and Transportation as evidence of their continuing intention to complete the K Route to Vienna. Brief for Appellants at 36. Thus, any dispute between the parties as to such expenditures related to their magnitude, not to their possibility.

The plainly wrong conclusions of the Court of Appeals in this case, in derogation of the findings of the District Court and the undisputed facts acknowledged by the parties, contribute substantially to the ultimate conclusion of the Court of Appeals that the finding of breach of contract by the District Court was clearly erroneous. It is submitted that, in cases such as this, the departure from the accepted standards of review requires the exercise of this Court's supervisory power. *See, e.g.*, Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605 (1974); McAllister v. United States, 348 U.S. 19

(1954); Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271 (1949), *aff'd on rehearing*, 339 U.S. 605 (1950). To decline to review the decision below would permit the Court of Appeals to rely upon plainly erroneous factual conclusions while disregarding the considered findings of the District Court. The action of the Court of Appeals prevents the rational briefing and argument of cases before it and is adverse to the effective administration of justice. For these reasons, this Court should not countenance this departure from the standards established in Rule 52(a) of the Federal Rules of Civil Procedure.

CONCLUSION

For all the foregoing reasons, the questions presented to this Court by this petition are of such a special and important nature to warrant the issuance of a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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December 15, 1978

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OPINION

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 77-2124

IN RE: CITY OF FAIRFAX, VIRGINIA,
Plaintiff,

—versus—

WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY, *et al.*,
Defendants.

CITY OF FAIRFAX,
Appellee,

—versus—

CITY OF ALEXANDRIA,
Appellant.

No. 77-2125

IN RE: CITY OF FAIRFAX, VIRGINIA,
Plaintiff,

—versus—

WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY, *et al.*,
Defendants.

CITY OF FAIRFAX,
Appellee,

—versus—

ARLINGTON COUNTY, VIRGINIA,
Appellant.

No. 77-2126

IN RE: CITY OF FAIRFAX, VIRGINIA,
Plaintiff,

—versus—

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, *et al.*,
Defendants.

CITY OF FAIRFAX,
Appellee,

—versus—

CITY OF FALLS CHURCH,
Appellant.

No. 77-2127

IN RE: CITY OF FAIRFAX, VIRGINIA,
Plaintiff,

—versus—

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, *et al.*,
Defendants.

CITY OF FAIRFAX,
Appellee,

—versus—

COUNTY OF FAIRFAX, VIRGINIA,
Appellant.

No. 77-2128

IN RE: CITY OF FAIRFAX, VIRGINIA,
Plaintiff,

—versus—

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, *et al.*,
Defendants.

CITY OF FAIRFAX, VIRGINIA,
Appellee,

—versus—

PRINCE GEORGE'S COUNTY, MARYLAND,
Appellant.

No. 77-2129

IN RE: CITY OF FAIRFAX, VIRGINIA,
Plaintiff,

—versus—

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, *et al.*,
Defendants.

CITY OF FAIRFAX, VIRGINIA,
Appellee,

—versus—

DISTRICT OF COLUMBIA,
Appellant.

No. 77-2130

IN RE: CITY OF FAIRFAX, VIRGINIA,
Plaintiff,

—versus—

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, *et al.*,
Defendants.

CITY OF FAIRFAX, VIRGINIA,
Appellee,

—versus—

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Appellant.

No. 77-2131

IN RE: CITY OF FAIRFAX, VIRGINIA,
Plaintiff,

—versus—

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, *et al.*,
Defendants.

CITY OF FAIRFAX, VIRGINIA,
Appellee,

—versus—

WASHINGTON SUBURBAN TRANSIT DISTRICT,
Appellant.

No. 77-2132

IN RE: CITY OF FAIRFAX, VIRGINIA,
Plaintiff,

—versus—

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, *et al.*,
Defendants.

CITY OF FAIRFAX, VIRGINIA,
Appellee,

—versus—

MONTGOMERY COUNTY, MARYLAND,
Appellant.

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. Oren R. Lewis, District Judge.

Argued: April 4, 1978 Decided: September 19, 1978

Before HAYNSWORTH, Chief Judge, RUSSELL and WIDENER, Circuit Judges.

William H. Horkan, Special Counsel to Washington Metropolitan Area Transit Authority and Washington Surburban Transit District (Cyril D. Calley, City Attorney, City of Alexandria; Jerry K. Emrich, County Attorney, Arlington; John R. Risher, Richard Barton, Edward Schwab, Corporation Counsel, District of Co-

lumbia on brief) for Appellants; John H. Rust, Jr. (Joseph V. Buonassissi, II, Rust, Rust and Pratt on brief) for Appellee.

RUSSELL, CIRCUIT JUDGE:

This is an action on contract. The contract arose in connection with the construction of a Metrorail system to serve the Washington (D.C.) area. To effectuate this end, the Washington Metropolitan Area Transit Authority (hereinafter referred to as the Authority) had been created as a body politic by an Interstate Compact between Maryland, Virginia and the District of Columbia, for the purpose of constructing a rapid rail transit system in the Washington Transit Zone. Such Zone covered the political entities of Prince George's County (Maryland), Montgomery County (Maryland), Fairfax County (Virginia), Arlington County (Virginia), the Cities of Alexandria, Fairfax and Falls Church (Virginia) and the District of Columbia. The terms of the Compact contemplated that the Authority should develop, subject to the approval of the several political entities to be served, a mass transit plan in line with the Compact's purposes, along with a proposed method of financing construction of such transit system to be approved and participated in by the several political entities involved, as well as the Federal Government.

In 1969, the Authority adopted, with the approval of the eight local jurisdictions within the Transit Zone, a mass transit plan, described by the parties to this appeal as ARS-68 (Revised). Such plan provided for a 100-mile Metrorail system, consisting of a number of routes designated on the plan by letters of the alphabet. The one with which this appeal is particularly concerned was designated as Route K, beginning at Rosslyn, Virginia, and terminating at Nutley Road near Vienna,

approximately three-quarters of a mile from the boundaries of the City of Fairfax. This particular Route was designed primarily to serve the residents in the area of the City of Fairfax. The entire plan was premised upon an estimated construction cost for the system as a whole of $2.5 billion, to be financed from three sources: 1. Contributions, representing two-thirds of the estimated costs, from the Federal Government; 2. Contributions from the eight local political entities within the Zone; and 3. The proceeds of revenue bonds to be issued by the Authority. This method of financing was adopted because the Authority had no independent taxing authority, and, except for the proceeds of revenue bonds and grants from the Federal Government, was dependent upon contributions committed to it by the eight local political entities.

In January, 1970, the several local political units, including the plaintiff City of Fairfax, entered into a Capital Contributions Agreement, under the terms of which each of the units promised to contribute a certain sum, calculated under a formula set forth in the Agreement, toward the fulfillment of the planned development. It was recognized in the Agreement, however, that the costs of construction could exceed this initial estimate and the local entities promised their "faithful cooperation and best efforts" to raise any additional local share required. The Agreement, in turn, obligated the Authority to use the funds contributed by the local units and funds realized from the other two sources of financing to construct the planned system "with all practical dispatch" substantially in accordance with ARS-68 (Revised) "as the same may hereafter from time to time be altered, revised or amended in accordance with the Compact," Subject to this provision set forth as paragraph 2.1 of the Agreement:

> "No such revision, alteration or amendment which would reduce the facilities to be constructed in ac-

cordance with the Adopted Regional System—1968 (Revised) within any Political Subdivision (or in the case of the City of Fairfax and the City of Falls Church, reduce the facilities serving such Political Subdivision) shall be adopted without the consent of such Political Subdivision."

Since it was "understood and agreed that definitive net project costs for the Transit System will not be determined until * * * completed," the Agreement, also, required the Authority, as the construction proceeded to make a recomputation of the contributions required of each local entity under the established formula on the basis of any increase in the estimated costs of completing the project beyond those originally contemplated. If, as a result of such increase in costs, an additional contribution were required, the local jurisdiction would be requested to contribute to such increased cost in accordance with the established formula. All the jurisdictions also agreed to use their "best efforts" to make such additional contributions as were requested of them because of such additional costs. The first date fixed for such recomputation was "a date five years after the start of construction of the Transit System, or July 1, 1974, whichever is the later date." Other recomputations were to be made "at least every two years" thereafter. This Agreement further incorporated a design and construction schedule in order to assure a sequence of construction of the System, "in which the construction activity would be carried out to achieve essentially equitable treatment of each of the jurisdictions as monies became available and work was accomplished."

As the project proceeded, costs did escalate beyond the initial estimate. At the time of the trial, the completion of the system was estimated to cost in excess of five billion dollars. However, by 1975, the funds raised by the political subdivisions under the first financing

plan were practically exhausted. Moreover, the Congressional appropriation for the project was likewise near exhaustion. The Authority was accordingly confronted with the problem of devising a new or revised financing plan in order to keep the project going and to avoid costly delays in the orderly prosecution of the project. The most important problem in connection with such financing plan was the federal support for the project, which had been increased from two-thirds to four-fifths of the cost of the program. Any additional federal funds could only be secured promptly from the Highway Trust Fund under the Federal-Aid Highway Act of 1973. The Administrator of the Urban Mass Transportation Administration, in order to make these increased Highway Trust funds available for the construction of certain parts of the proposed system, demanded that some parts of the system be deferred until an alternatives analysis study was completed for the purpose of determining whether another mode of transportation would be more cost effective for the corridors to be served by certain parts of the routes which included Route K from Glebe Road to Nutley Road Station. Until this alternatives study was completed, final completion of Route K was to be deferred. Moreover, any construction of Route K beyond Glebe Road was impossible because of the unavailability of a right-of-way in the median of proposed Interstate 66 along which the rail line was to run from Glebe Road to Nutley Road Station. Until Interstate 66 was free of litigation, it was uncertain whether that highway would be constructed and whether there would be a median in such highway along which the Metro system could run.

Confronted with these difficulties, the Authority sought to reach an agreement with the local jurisdictions which would permit the continued construction of that part of the entire project for which there was federal financing then available and the construction of which was not

impeded by pending litigation or delayed pending an alternatives study. To this end, the local jurisdictions (other than the City of Fairfax)[1] entered into an Interim Capital Contributions Agreement whereby the local political units would contribute sufficient local funds, which, supplemented by federal highway transfer funds, would permit the construction of those parts of the project then approved for the use of federal funds. This Interim Plan, as originally drafted in October of 1976, included this provision pertinent to the controversy between the parties:

> "No signatory of this Agreement shall be obligated to fund construction not included in this Agreement or to pay in excess of the amounts specified above, except for interest penalties in accordance with Paragraph 1 above. Funding of additional construction beyond that covered in this Agreement shall be dependent upon the adoption of a financial plan and a new or revised Capital Contributions Agreement."

However, at least two of the political units which were to execute the Interim Capital Contributions Agreement expressed dissatisfaction with the inclusion in the Plan of the quoted provision. Thus Prince George's County at the meeting of its Council on December 21, 1976, conditioned its agreement to the Plan on the understanding "that this Agreement in no way abridges the rights and responsibilities of the various parties to the January 9, 1970, WMATA Capital Contributions Agreement to complete the Metrorail system" and "that the Office of Law is authorized to change the language of

[1] The City of Fairfax refused to agree because of the absence of any provision for the complete construction of Route K in the proposed Plan. Finally, in order to proceed with those portions of the system then available for construction, it was agreed to eliminate the City of Fairfax as a signatory of the Plan.

Paragraph 3 [the quoted provision] to further carry out the concept that there be no such abridgment." After some discussion among the parties to the Plan, it was agreed to "delete Paragraph 3 [the quoted provision] in its entirety from the Plan and to provide that "[n]o language will be included in the revised Interim Agreement, in other words, which might be read to compromise or modify the 1970 Agreement." Confirmatory of this change, the Montgomery County Council formally approved on January 11, 1977, the deletion of "Paragraph 3" from the Interim Capital Contributions Agreement and added "that the Montgomery County Council understands that the Amended Interim Capital Contributions Agreement is not intended to alter the obligations of the respective signatories to the original Capital Contributions Agreement as set forth in that Agreement."

In the meantime, the plaintiff City of Fairfax filed this action on December 13, 1976, against the Authority and the local jurisdictions which were signatories to the Interim Plan. The basic claim made by the plaintiff was that the Interim Capital Contributions Agreement of 1976 "constitute[d] a repudiation and breach of the Capital Contributions Agreement [of 1970] and represent[ed] a refusal to perform thereon on the parts" of the other signatories to the Agreement of 1970. It accordingly sought both injunctive relief and damages against the Authority and the other local political entities which were signatories of that Agreement. After a trial, the District Court found that the defendants had breached the 1970 Capital Contributions Agreement, but denied any injunctive relief, holding that plaintiff's remedy was for damages, which it proceeded to assess as the amount of the plaintiff's contribution to the project. From this judgment entered on these findings, the defendants have appealed. We reverse.

Plaintiff premised its right of recovery on the doctrine of anticipatory breach or, as it is sometimes described, a

"breach by anticipatory repudiation." Under this doctrine, if one party to a contract declares in advance that he will not perform at the time set for his performance, the other party may bring an immediate action for total breach of the contract. That doctrine, though sometimes criticized as a harsh remedy,[2] has been generally accepted both in federal and state decisions,[3] including those of Virginia [4] and Maryland.[5] It is included in the Restatement of Contracts [6] as well as in the Uniform Commercial Code.[7] But "[t]o constitute an 'anticipatory breach,' [within this rule] it must appear that the party bound under a contract has unequivocally refused to perform," [8] or, as the Supreme Court put it in *Dingley* v. *Oler*, *supra*, at 502 (117 U.S.), there must be "a positive, unconditional, and unequivocal declaration of fixed pur-

[2] *Marr Enterprises, Inc.* v. *Lewis Refrigeration Co.* (9th Cir. 1977) 556 F.2d 951, 956; Terry, *Book Review*, 34 *Harv. L. Rev.* 891, 894 (1921).

[3] *Dingley* v. *Oler* (1886) 117 U.S. 490, 502; *Roehm* v. *Horst* (1900) 178 U.S. 1, 8-13; *McJunkin Corp.* v. *North Carolina Natural Gas Corp.* (4th Cir. 1961) 300 F.2d 794, 801, *cert. den.* 371 U.S. 830 (1962); *Suburban Improvement Co.* v. *Scott Lumber Co.* (4th Cir. 1933) 67 F.2d 335, 337, *cert. denied* 287 U.S. 660, 90 A.L.R. 330; *Johnson* v. *McKee Baking Company* (W.D.Va. 1975) 398 F. Supp. 201, 205, *aff'd.* 532 F.2d 750; *Matzelle* v. *Pratt* (E.D.Va. 1971) 332 F. Supp. 1010, 1012.

[4] *Sternheimer* v. *Sternheimer* (1967) 208 Va. 89, 155 S.E.2d 41, 47; *Greenbrier Farms* v. *Clarke* (1952) 193 Va. 891, 71 S.E.2d 167, 171; *Simpson* v. *Scott* (1949) 189 Va. 392, 53 S.E.2d 21, 24.

[5] *Harrell* v. *Sea Colony, Inc.* (1977) 35 Md. App. 300, 370 A.2d 119, 123-124; *Weiss* v. *Sheet Metal Fabricators* (1955) 206 Md. 195, 110 A.2d 671, 674-675; *Speed* v. *Bailey* (1927) 153 Md. 655, 139 A. 534, 537.

[6] Restatement of Contracts, § 318 (1932).

[7] Uniform Commercial Code, § 2610; Comment, *Anticipatory Repudiation Under the Uniform Commercial Code: Interpretation, Analysis, and Problems*, 30 Sw.L.J. 601 (1976).

[8] *Suburban Improvement Co.* v. *Scott Lumber Co.*, *supra*, at 337 (67 F.2d).

pose not to perform the contract in any event or at any time." [9]

The strictness of this requirement of an absolute and unequivocal refusal to perform is illustrated by a number of cases in this and other circuits as well as in the Supreme Court itself. In *Frank F. Pels Co.* v. *Saxony Spinning Co.* (4th Cir. 1923) 287 Fed. 282, 288, there had been much controversy over the contract, which was the subject of the litigation, and the defendant, which had had considerable difficulty in securing performance by the plaintiff, refused to proceed unless the plaintiff made "satisfactory arrangements with [it]" for the latter's performance under the contract. This conditional refusal was found not to satisfy the test of "an absolute, positive, and unequivocal refusal to comply" required under the doctrine of anticipatory breach.

Similarly, in *Suburban Improvement Co.* v. *Scott Lumber*, *supra*, at 337 (67 F.2d), the defendant had denied it was bound under the contract, contending that the agreement was a mere option. This was held not "equivalent to refusing to take the lots which it was obligated to take" under the contract and insufficient to support a claim of anticipatory breach.

Nor are these decisions of our Circuit out of line with the rule as it has been applied either by other Circuits or by the Supreme Court itself. Thus, in *Dingley* v. *Oler*, *supra*, the defendant, while declining to deliver ice in the

[9] *See, also: Lumbermens Mutual Casualty Company* v. *Klotz* (5th Cir. 1958) 251 F.2d 499, 504 ("To precipitate anticipatory breach, there must be a complete renunciation of the contract, a categorical claim that it has never been or no longer is, valid and binding whatsoever.")

For the distinction between the anticipatory breach giving rise to a cause of action for damages and an excuse for non-performance, *see Guaranty Bank and Trust Company* v. *Reyna* (1964) 51 Ill. App. 2d 412, 201 N.E.2d 144, 150-151 (quoting from Williston, *Contracts*, §§ 1324, 1326 (Rev. ed. 1937)).

1880 season as agreed, did suggest that if the price increased, they might deliver. In finding error in the trial court for holding on those facts an anticipatory breach, the Supreme Court said:

> "Although in this extract they declined to ship the ice that season, it is accompanied with the expression of an alternative intention, and that is, to ship it, as must be understood, during that season, if and when the market price should reach the point which, in their opinion, the plaintiffs ought to be willing to accept as its fair price between them. It was not intended, we think, as a final and absolute declaration that the contract must be regarded as altogether off, so far as their performance was concerned, and it was not so treated by the plaintiffs. * * *
>
> "This, we think, is very far from being a positive, unconditional, and unequivocal declaration of fixed purpose not to perform the contract in any event or at any time." 117 U.S. at 501-502.

In *McCloskey & Co.* v. *Minweld Steel Co.* (3d Cir. 1955) 220 F.2d 101, 104, the defendant, a subcontractor, had agreed to supply the steel required in the construction of a major hospital. There was delay in performance by the defendant and the plaintiff, the primary contractor, sought from the defendant assurance of the latter's ability to perform under its contract. The defendant replied that it was unable to secure the steel needed for performance, that it had been turned down by all the steel suppliers and it requested the assistance of the plaintiff itself in securing the steel. The plaintiff charged that such a reply represented a plain manifestation of an inability to perform. The Court held, however, that there had been no anticipatory breach because the defendant had not declared that it "had definitely abandoned all

hope of otherwise receiving the steel and so finishing its undertaking."

McCloskey emphasis what is another essential element in the anticipatory breach doctrine, *i.e.*, that it must be a repudiation of the very essence of the contract.[10] It cannot consist of a mere partial breach;[11] nor can it be based on mere delay unless the contract makes time of the very essence.[12] The rule is that, in order to give rise to an anticipatory breach which will support an action for breach of the contract, the breach must be "so material and substantial in nature that it affects the very essence of the contract and serves to defeat the object of the parties;"[13] it must be a "refusal to perform * * * of the whole contract or of a covenant going to the whole consideration;"[14] and it must be "of such substantial character as to defeat the object of the parties in making the contract."[15] As Corbin summarizes it, the non-performance or breach of a part of the contract "not going to the essence" of the contract will not support an action "for a total non-performance of the contract, unless he awaits the occurrence of an additional breach by the other party that is so material in character that, when added to the partial breach, the two taken together go to the essence and make the breaches so substantial as to be total." 4 Corbin on *Contracts*, § 972, p. 901.

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[10] *See also Dingley* v. *Oler, supra*, at 503 (117 U.S.)

[11] 4 Corbin on *Contracts*, § 972, p. 901.

[12] *Matzelle* v. *Pratt, supra*, at 1012 (332 F. Supp), in which the Court said that where time was not of the essence, delay in performance "is simply not a material or substantial breach justifying rescission."

[13] *Matzelle* v. *Pratt, supra*, at 1012 (332 F. Supp.); *Compos* v. *Olson* (9th Cir. 1957) 241 F.2d 661, 663.

[14] *Kemel* v. *Missouri State Life Ins. Co.* (10th Cir. 1923) 71 F.2d 921, 923.

[15] *Sternheimer* v. *Sternheimer, supra*, at 47 (155 S.E.2d).

Of course, the repudiation, though it must be unconditional and total, need not be express or dependent on "spoken words" alone; it may rest on a defendant's conduct evidencing a clear intention "to refuse performance in the future," such as placing himself "in a position in which performance * * * would be impossible * * *." [16]

In the application of these principles to the facts of a particular case, the initial inquiry to be addressed centers on the determination of the basic object sought to be secured by the plaintiff from the agreement and the consideration for which the plaintiff bargained in entering into such contract. This is so because, as we have noted, an anticipatory breach which will support an action for breach of the contract must go "to the whole consideration" of the contract and must relate to "the essence of the contract," so far as the complaining party is concerned. To repeat, it cannot rest on a "partial

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[16] Thus, in *Roehm* v. *Horst*, the Court said:

> "It has always been the law that where a party deliberately incapacitates himself or renders performance of his contract impossible, his act amounts to an injury to the other party, which gives the other party a cause of action for breach of contract." (178 U.S. at 18)

See also Johnson v. *McKee Baking Co.*, *supra* at 205 (398 F. Supp.); *Tobriner* v. *Mayfair Extension Incorporated* (D.C.D.C. 1966) 250 F. Supp. 614, 617-618, *aff'd.* 382 F.2d 475; *Keep Productions* v. *Arlington Park Towers* (1977) 49 Ill. App. 3d 258, 364 N.E.2d 939, 944.

In the *Restatement* three situations are listed which will constitute an anticipatory repudiation:

> "(a) a positive statement to the promisee or other person having a right under the contract, indicating that the promisor will not or cannot substantially perform his contractual duties; (b) transferring or contracting to transfer to a third person an interest in specific land, goods, or in any other thing essential for the substantial performance of his contractual duties; and (c) any voluntary affirmative act which renders substantial performance of his contractual duties impossible, or apparently impossible." § 318.

breach" or on a breach of a provision in the contract or agreement which is not "so substantial as to defeat the object of the parties in making the contract."

Considered in the light of these criteria, the record makes it crystal clear that the plaintiff's real object in executing the 1970 Agreement was to secure the construction of Route K of the Metrorail for the benefit of its citizens. That manifestly was the consideration it bargained for in return for its agreement to contribute to the costs of the project. That for the plaintiff was the "essence" of the agreement. The language of the 1970 Agreement itself makes this plain. The relief demanded by the plaintiff in its complaint also attests to this fact: The plaintiff asked the Court in the alternative either to issue a mandatory injunction which would require the completion of Route K or for damages in the amount of its contributions, either in dollars or credit, to the overall project. In addition, the plaintiff's city manager, in his testimony, declared unequivocally that this was the object of the plaintiff in executing the 1970 Agreement. In answer to the question, "Assuming that Nutley Road station [now referred to as the Vienna Station] could be built by, say, between 1982 and 1984, would Metro have complied with its obligations under the Capital Contributions Agreement of 1970?", he candidly conceded, "In my opinion, yes." The repudiation in this case thus must consist of an absolute, positive and unequivocal refusal to construct Route K on the part of the defendants, or some act on the part of the defendants which made it impossible for Route K to be completed. If the record will not support such a finding, there is no anticipatory breach and there can be no recovery by the plaintiff in the present action for breach of the 1970 Agreement.

The record is wholly insufficient to support a finding of an unequivocal repudiation or abandonment by the defendants of the plan to construct the full length of

Route K as provided in the 1970 Agreement. The only basis on which the plaintiff asserted there was such an express repudiation or abandonment was the execution by the defendants of the Interim Capital Contributions Agreement in 1977. When the Authority considered the initial draft of this Interim Capital Contributions Agreement, however, it firmly disclaimed any purpose of effecting thereby "an abrogation of the existing Agreement (*i.e.*, the 1970 Agreement)" and it restated at the time it approved such draft for submission to the local jurisdictions "the intention of the Authority that the entire 100-mile system [would] be built." When this initial draft was submitted to the local jurisdictions for their approval and execution, those defendants, as we have said, expressed concern whether the proposed Plan was sufficiently clear on their common resolve to complete the project as planned under the 1970 Agreement, particularly in the light of Paragraph 3 of such draft. The general counsel of the Authority sought to allay their concern by assuring the local jurisdictions, including the plaintiff, that in his opinion all the terms of the 1970 Agreement "will remain viable after execution of the Interim Agreement." Despite this assurance of the Authority's general counsel who was presumably responsible for the initial draft of the Plan, some of the local jurisdictions still found Paragraph 3 of the initial draft of the Interim Plan objectionable because of what they considered its possible ambiguity on the continued resolve of the parties to construct as planned the entire Metrorail system, including Route K. Typical was the action of the County Council of Prince George's County. That Council, in a formal resolution, conditioned its execution of the Interim Plan upon the following specific understandings:

> "[F]irst, that it is understood by Prince George's County that this Agreement in no way abridges the rights and responsibilities of the various parties to the January 9, 1970, WMATA Capital Contributions Agreement to complete the Metrorail system second, that the Office of Law is authorized to change the language of Paragraph No. 3 to further carry out the concept that there be no such abridgement; and, third, that the Agreement itself not be executed until after a satisfactory Memorandum of Understanding with Montgomery County has been signed by that County and concurred in by the Department of Transportation, State of Maryland."

The initial Interim Plan, as originally approved for submission to the local jurisdictions for approval, was accordingly changed and, in its final, executed form, Paragraph 3, which the plaintiff as well as other local jurisdictions had found inappropriate, was deleted and the clear intention of all the parties not to abandon or repudiate their obligations under the 1970 Agreement to complete the system in accordance with ARS-68 (Revised), including Route K, was reaffirmed.

It is accordingly manifest that whether Paragrph 3 of the initial draft of the Interim Capital Contributions Agreement could be read as suggesting that the parties to that Plan had repudiated their 1970 Agreement to complete the project as outlined in ARS-68 (Revised) is irrelevant. This is so because, as we have already pointed out, that Paragraph was deleted from the final draft of the Interim Plan, which the defendants executed and to which they agreed. And it was deleted because the defendants did not want to leave any doubt about their intention and resolve to complete the full project as planned. Yet, despite all this, the plaintiff has persisted in arguing that the initial draft of the Interim Plan, adopted by the Authority on December 2, 1976, and thereafter submitted to the local jurisdictions for their approval with the challenged Paragraph 3 included, rep-

resented the agreement of the parties. And the District Court appears to have accepted this argument and to have rested its conclusion largely on a finding to this effect. Thus, it found:

> "The breach in this case occurred when WMATA approved the interim capital contributions agreement on December 2, 1976. That amendment terminated the K Route at Glebe Road in Arlington—a substantial reduction in facilities serving the City of Fairfax."

What both the plaintiff and the District Court would disregard is that the Authority had no authority to bind any of the local jurisdictions to any obligation or, for that matter, to absolve them from any obligation which they had previously assumed. The Authority was merely the agent to carry out the agreements made by the local jurisdictions and to perform such functions as were delegated to it by those jurisdictions. This was the reason the Authority submitted the initial draft of the Interim Plan to the local jurisdictions for approval and it was the reason that the Interim Plan was not treated as operative and effective until it had been duly executed by the local jurisdictions. At best the Interim Plan as considered by the Authority on December 2, 1976 was no more than a proposal and, until it had been approved and executed by the local jurisdictions which were to be bound by it, it remained a mere proposal, an incomplete agreement without binding effect on the parties named. It only gained the stature of an agreed contract when all the parties thereto had joined in its execution. Indeed, it is difficult to understand how the plaintiff could assume that a proposed contract, which the necessary parties never actually signed or even approved could be a valid and binding contract until all those parties to be bound had actually approved and executed such contract. The reliance of the plaintiff, as well as the District Court,

upon the initial draft of the Interim Plan and its Paragraph 3, which was deleted from the *final executed* Plan, is thus misplaced. The omission of Paragraph 3 from the final, approved Interim Plan—the only Plan actually approved and signed by all the parties—was not a modification or retraction of any previously existing, binding, effective Interim Plan; it was, and is the only Interim Plan actually approved and executed by the parties.[17]

Even if the defendants did not expressly repudiate their obligations under the 1970 Agreement to construct Route K as a whole, the plaintiff seems to suggest that, in effect, the defendants, by their voluntary execution and implementation of the final Interim Plan, as approved and executed by the parties, made it impossible for them to perform their obligation to complete Route K as contemplated by the 1970 Agreement. This contention is predicated upon an assumption that the parties will never enter into another Plan to finance the construction of that part of Route K which was deferred in the Interim Plan, that they have indicated as much, and that the Interim Plan represents the final agreement of the parties to contribute to the construction of a Metrorail system for the Washington area. The flaw in this argument is that it does not square with the facts and the District Court recognized that this was the case. Thus, the Court conceded that "it is not conclusive that the

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[17] The plaintiff's attempt to convert the initial draft of the Interim Plan, considered by the Authority at its Board meeting on December 2, into the real agreement of the parties and the subsequent disapproval of that proposed Plan and drafting of a different Plan, which was the only Plan approved and executed by the parties, into a retraction of the provisions of an earlier valid and binding Plan, assumed to have been executed on December 2, is no more than a fanciful attempt to conjure up a factual situation to fit an imagined theory of an invalid retraction of an earlier unequivocal repudiation of the 1970 Agreement. The law relied on for this faulty theory is sound (4 Corbin on *Contracts*, § 980 at p. 931 (1951 ed.)) but the facts in this case simply don't jibe with the theory.

interim capital contributions agreement is the final round of financing for the Metrorail construction." Indeed, the record, and especially action officially taken after the hearings in the District Court were concluded,[18] demonstrate that the parties are not only intending but are actually engaging in preparing plans for the further financing required for the completion of Route K, as well as certain other segments of the projected system which were deferred by the Interim Plan. Nor is there anything in the Interim Plan of 1977 as finally executed, which suggests even obliquely that the parties did not intend further financing in order to complete the system. Paragraph 3 of the proposed draft of the Interim Plan was disapproved simply because it was feared that such paragraph might be construed to have this effect. And it was to make perfectly clear and positive that the parties intended no abandonment of the plan to construct the full system, as outlined in ARS-68 (Revised), and no repudiation, in any particular, of the obligations assumed by them in the 1970 Agreement, that the parties exised from the final, executed Interim Plan paragraph 3 of the earlier draft.

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[18] This is evidenced by the alternatives study, as officially conducted, which the defendants have requested us to notice. On the other hand, the plaintiff has asked us to take notice of a letter written by the Secretary of Transportation under date November 21, 1977. This letter the plaintiff takes as a flat statement that the federal government will not make its required contribution for the completion of Route K. We do not so read the Secretary's letter. Expressing his personal commitment to the project, he said that federal funding should await the completion of the alternatives study and an establishment of priorities by the defendants. He suggested that the available federal funds would be allocated after consideration of the alternatives study and the priorities recommended by the defendants. The alternatives study suggests that Route K will be given consideration for federal funding when the Secretary reviews that study. There is no reason at this point to assume that such review will not be favorable to the completion of Route K.

Moreover, it must be emphasized that the District Court never found that Route K would not be completed as contemplated under the 1970 Agreement. And the plaintiff emphasizes this in its brief in this appeal; in fact, it seems to take the position that such a finding was unnecessary in order to support an action to recover damages for an anticipatory breach of the Agreement. Yet the very essence of the plaintiff's right of action is that either the defendants have unequivocally repudiated any intention "at any time" [19] to construct such a system with Route K included or have so completely disqualified themselves voluntarily that they cannot construct such a system. Absent such a finding, the plaintiff's action for a total breach of the 1970 Agreement is premature.

As a matter of fact, the plaintiff seems during trial to have departed from the theory that the defendants had repudiated or abandoned any intention "at any time" of completing Route K and to have adopted the view that the defendants' failure to conform to two subsidiary provisions of the 1970 Agreement were sufficient to give the plaintiff a right of action for damages for total breach of that Agreement in advance of the time fixed in the Agreement for performance of the object which was the consideration bargained for by the plaintiff (*i.e.*, the construction of Route K).

This is no more than an argument that, if one party to a contract violates any provision of a contract, whatever its materiality, such violation will represent an anticipatory breach, giving the other party the right to recover damages for the breach of the entire contract.[20]

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[19] *Dingley* v. *Oler, supra,* at 502 (117 U.S.).

[20] This is not to say that, if the plaintiff can show damages, it may not recover at once for a partial breach of a contract but, and this is the important fact so far as this action for a total breach is concerned, *he cannot recover for the anticipatory breach of the entire contract unless, as we have said, the partial breach is so sub-*

But this, as we have seen, is just what the doctrine of anticipatory breach does not authorize. The Courts and textwriters have repeatedly declared that an anticipatory breach cannot be predicated on a partial breach of the contract or on a breach which is "of such substantial character as to defeat the object of the parties in making the contract." [21] Neither of the breaches relied on by the plaintiff and identified by the District Court as a basis for its findings will meet this test.

The failure to make the computations called for under Section 3.3(b) of the 1970 Agreement, which was the first of the omissions relied on by the plaintiff, was immaterial, so far as the accomplishment of the objective of that Agreement itself was concerned. The plaintiff argues, and the District Court seems to accept this argument, however, that, if the computations had been made beginning in 1974, followed by calls for contributions upon the local jurisdictions, there would have been no reason to defer the construction of Route K in 1976 and the Authority would have had adequate funds at that time for the completion of the project as planned under ARS-68 (Revised) when the Interim Plan was executed. The argument disregards the clearly established facts. The deferment of Route K was not caused by any delay on the part of the local jurisdictions in making their contributions to its costs. In fact, there was no basis on which such computation could have been intelligently

stantial and material that it renders impossible the later performance of the primary object of the agreement. See 4 Corbin on *Contracts*, § 972 at pp. 900-901; *N.Y. Life Ins. Co.* v. *Viglas* (1936) 297 U.S. 672, 681-682. So far as we can see, plaintiff suffered no damage from the failure of the defendants to comply punctually with the two provisions relied on by it for its claim of a total breach. It is unnecessary for us to decide this, however, since the plaintiff is seeking to recover for the total breach of the 1970 Agreement and not damages for the breach of some subsidiary provisions.

[21] See authorities cited in notes 13, 14 and 15.

made in 1974 or 1975. The amount and timing of such contributions depended on the availability of the federal share of the construction costs. The federal government's share of the costs for completing the project, it is true, had been increased, during the progress of the project, from two-thirds to four-fifths—but the federal appropriation for the project was, as a practical matter, exhausted. Any additional federal funds required for the federal share of the construction costs, could only be secured by transfers from the highway trust fund. Such transfers required the authorization of the Secretary of Transportation. The Secretary of Transportation, however, was unwilling to authorize such transfers until an alternatives study had been prepared and submitted in connection with the completion of Route K beyond Glebe Road and of four other routes. It would accordingly have been an entirely futile exercise to compute and demand contributions from local jurisdictions until the Authority knew the federal contribution was available. Moreover, any computation prior to this knowledge would have been useless, since between its preparation and the time when the federal contribution might be assured, construction costs, interest charges, and demographic changes in the various parts of the zone to be served would have changed, invalidating completely any earlier computation of costs and anticipated revenue.

The second departure from the strict language of the 1970 Agreement, on which the plaintiff relies, is the provision which states that there shall be no revision, alteration or amendment altering the facilities to be constructed under ARS-68 (Revised) without the consent of the local jurisdiction to be served by the facility. The plaintiff contends the deferment in the construction of Route K beyond Glebe Road was not consented to by it and was therefore a violation of the above provision. Without tarrying to consider whether such deferment was a revi-

sion within the terms of the 1970 Agreement, the fact is the Authority had no choice to do other than defer at that time further construction beyond Glebe Road. In the first place, it could not have proceeded with construction beyond Glebe Road as contemplated under the express language of ARS-68 (Revised), whether it wished to or not. ARS-68 (Revised) provided specifically that from Glebe Road to Nutley Station the system should run along the median of Interstate 66.[22] But concededly, when the Interim Plan was formulated, the construction of Interstate 66 was enjoined under pending litigation. Certainly, under those circumstances, the Authority could not be expected to stop all construction simply because, in the absence of the necessary right-of-way, it could not at the moment proceed with construction of Route K beyond Glebe Road. The Interim Plan was no more than a

[22] The District Court found that "[t]he completion of I-66 was not included in the 1970 capital contributions agreement—It was not even mentioned." However, the ARS-68 (Revised) plainly provides that Route K was to be built in the I-66 median. Thus, it states that "[t]he route [Route K] continues in subway under Fairfax Drive to a point west of Glebe Road where it enters the median of the proposed Interstate Route 66. The route continues westward on the surface of the median of Interstate Route 66 to a terminal at Nutley Road." This provision, along with all other terms of ARS-68 (Revised) is incorporated by reference into the 1970 Agreement by Section 2.1 of that Agreement. The District Court is thus in error in dismissing the linking of the completion of Interstate 66 to the completion of Route K.

Actually, the designs of Interstate 66 have consistently included a provision for the use of the median for the K-line. As originally designed, this highway was to include four lanes in each direction with the K-line operating down the median. Recently, Interstate 66 has been redesigned to consist of only two lines in each direction, with the K-line operating down the median. The reduction in the lanes was based on the confident assumption that the K-line would be built and that an Interstate 66 with less lines for motor traffic would encourage commuters to use the K-line rather than Interstate 66. Thus, there is complete integration of the two projects—the K-line and Interstate 66—and strong evidence both of the intention that the K-line shall be built and of the necessity that such line be built.

reasonable solution for what the parties assumed and hoped was merely a temporary problem, which in time would be solved. Subsequent events have shown that this assumption was sound, since construction of Interstate 66 appears now to have surmounted all legal challenges. In addition, the federal government refused at the time the Interim Plan was agreed upon to advance any funds for construction of Route K beyond Glebe Road until after an alternatives study had been concluded. Again, it would have been unreasonable to expect all construction on other parts of the system, for which adequate financing was available, to be deferred until the alternatives study had been concluded and considered by the Secretary. But the important fact is that, despite these tentative roadblocks, the defendants have aggressively pressed on with plans for the construction of the system along Route K beyond Glebe Road. They have completed the alternatives study and have reaffirmed their commitment to the completion of Route K. They are even now engaged in the preparation of a contribution and construction schedule for the project. The defendants are confident that within the time provided for the completion of the system Route K beyond Glebe Road will be constructed. The District Court recognized this. Under such circumstances, it cannot be said the defendants have repudiated the real objective of the 1970 Agreement or abandoned the firm intention to complete the construction of a 100-mile Metro system for the Washington area. There has thus been no anticipatory breach of that Agreement by the defendants, authorizing a suit to recover damages for such "total breach." The findings of the District Court to the contrary were clearly erroneous.[23]

[23] The defendants raised other claims of error in the decision of the District Court. Since we find the absence of an anticipatory breach, as that term is defined in the law of contracts, it is unnecessary to consider these other claims.

The judgment of the District Court is accordingly vacated, with directions to dismiss the action of the plaintiff as premature, without prejudice to plaintiff's right, if it develops that the defendants have unequivocally abandoned hope of constructing Route K beyond Glebe Road, as provided in the 1970 Agreement, or if Route K is not completed within the time fixed for the completion of the system in the 1970 Agreement, to file such other actions as may then be appropriate.

REVERSED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

[Filed, Feb. 25, 1977, Clerk, U.S. District Court, Alexandria, Virginia]

Civil Action No. 76-918-A

CITY OF FAIRFAX, VIRGINIA,
Plaintiff

v.

WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY, ET AL.,
Defendants

MEMORANDUM OPINION AND ORDER

The City of Fairfax brought this suit against the other signatories of the January 9, 1970 revised capital contributions agreement and guaranty agreement, and the other named defendants, for injunctive and other relief.

The City says the other signatories breached the January 9th agreement by failing to make the recomputations called for in the agreement—by approving or agreeing to approve an interim capital contributions agreement which, among other things, alters the design and contributions schedule for the completion of ARS-1968 (Revised) and reduces the facilities serving the City of Fairfax without the consent of the City.

All of the defendants responded by denying any and all of the claimed breaches, and all expressed—some before, some after, the filing of this suit—their intention of exercising their best efforts to complete the rapid transit system as originally approved.

All filed motions to dismiss and/or motions for summary judgment on various grounds.

The rulings on the motions were deferred until the hearing on the merits.

Extensive discovery was had by all of the parties—and the liability phase of the case was heard on the exhibits, depositions and the live testimony offered by the plaintiff, WMATA and the defendant political subdivisions.

From the record thus made, the Court makes the following findings—

The Washington Metropolitan Area Transit Authority (hereinafter referred to as WMATA), pursuant to the authority granted in the interstate compact between Maryland, Virginia and the District of Columbia, adopted and revised a regional rapid rail transit plan and program (hereinafter referred to as ARS-1968 (Revised)), which, among other things, specifies the facilities of such regional transit system to be acquired and constructed and a plan for financing the construction and acquisition of such regional transit system.

The financing plan as adopted proposed that the estimated cost of the construction and acquisition of such regional transit system be financed by the issuance of $880,000,000 transit revenue bonds and the payment of $1,720,566 in capital contributions—approximately one-third to be contributed by the political subdivisions and the remaining two-thirds by the Federal government.

Section 22 of the compact prohibits WMATA from constructing any facilities or incurring any obligations with respect thereto until funds are available therefor.

Therefore, in order to insure the orderly development of the said regional transit system and that each of the political subdivisions would agree to make its capital contributions as provided for in the agreement, WMATA and the said political subdivisions executed a revised capital contributions agreement and guaranty agreement dated January 9, 1970.

This is the agreement the City of Fairfax says WMATA and the other political subdivisions breached.

Section 2.1 of the January 9th agreement requires that WMATA shall proceed with all practical dispatch to construct and acquire the regional transit system substantially in accordance with ARS-1968 (Revised), as the same may hereafter from time to time be altered, revised or amended in accordance with the compact; provided, however, that WMATA shall not construct or be under any obligation to construct the facilities specified in any such revision, alteration or amendment of ARS-1968 (Revised) until and unless the January 9th agreement is appropriately amended or other arrangements are made, which, in the opinion of WMATA, assure the availability of adequate funds to finance the transit system substantially in accordance with ARS-1968 (Revised) as so revised, altered or amended. No such revision, alteration or amendment which would reduce the facilities to be constructed in accordance with ARS-1968 (Revised) within any political subdivision (or in the case of the City of Fairfax and the City of Falls Church, reduce the facilities serving such political subdivision) shall be adopted without the consent of such political subdivision.

ARS-1968 (Revised) consists of a number of rapid transit routes (designated by letters of the alphabet), the City of Fairfax to be served by the K Route which begins in Rosslyn and terminates at Nutley Road in Fairfax County, some three quarters of a mile from the City's limits.

The system incorporated a design and construction schedule for the construction and operation of the transit system to insure essentially equitable treatment of each jurisdiction.

This schedule has been revised from time to time by WMATA's board of directors after having been first

submitted to the District of Columbia, the Washington Suburban Transit District and the Northern Virginia Transportation Commission for review and modification —However, the original phasing has never been changed absent consent of all of the signatories of the January 9th agreement.

WMATA and the other political subdivisions have changed and are proposing to further change the originally incorporated design and construction schedule by adopting a so-called interim capital contributions agreement—all without the consent of the City of Fairfax.

Section 3.3(a) of the revised January 9th capital contributions agreement provides that WMATA shall recompute the capital contributions required of each political subdivision five years from the date of the start of construction or January 1, 1974, whichever is later, and from time to time and at least every two years thereafter (Section 3.3(d)).

These recomputations were required "in order to insure the availability of funds to finance project costs."

They should have been made on December 9, 1974 and 1976, and every two years thereafter.

It is conceded they have not been made as of this date.

Section 3.1 of the January 9th agreement provides that each political subdivision shall contribute to the capital required by WMATA for the construction and acquisition of the transit system by making capital contributions to WMATA in the amounts and on or before the times specified in the capital receipts schedule, as the same may be revised from time to time in accordance with Section 3.2 of the agreement.

Section 3.2 refers to Schedule A, appended to the agreement, which lists the amounts and due dates of the capital contributions to be made by each political subdivision

under this agreement, and gives WMATA the right to revise the schedule from time to time to provide the timely flow of funds necessary for the acquisition and construction of the transit system, provided that no such revision shall increase the amount of all the capital contributions required from any political subdivision without its consent, and so forth.

When it became apparent to all concerned that ARS-1968 (Revised) could not be acquired and constructed for the amount estimated in the January 9th agreement, some of the jurisdictions not only delayed making their required payments—they refused to make them until they were assured the routes they were most interested in were included in the proposed interim capital contributions agreement.

Fairfax City refused to agree to a requested accelerated payment until WMATA made the recomputation as provided for in the January 9th agreement—WMATA agreed to so do on or before June 30, 1975 and, if not, to refund the requested payment plus interest—Fairfax City then made the requested accelerated contribution.

WMATA did make some tentative estimates of additional costs necessary to complete the system but its board of directors refused to approve and/or release this information—Therefore WMATA returned the requested accelerated contribution that Fairfax City had made.

The City was later told that a tentative recomputation indicated they had already made all of their agreed capital contributions.

Secretary of Transportation Coleman advised the chairman of WMATA's board of directors in January of 1976 that the use of interstate transfer provisions by the States and the District of Columbia was the best means

of providing financing for the unfunded portion of WMATA's capital construction costs.

Shortly thereafter Maryland and the District of Columbia began to determine how such transfers might be made.

At the same time WMATA's general manager stated that he felt that it was necessary for the board to remove any doubt as to its support of the entire hundred-mile system and offered a motion that the board reaffirm its support to the full ARS, opposing all studies for truncating the system—The motion failed for want of a second.

WMATA approved the first application for the transfer of interstate highway funds from the District of Columbia in September of 1975 (the "A" package).

In early 1976 representatives of WMATA, the District of Columbia and Maryland met to consider the second package of transferred interstate highway funds, known as the "B" package. Maryland required that the construction of the A Route as far as Shady Grove Road be included among the projects selected for funding—This requirement, however, was modified upon WMATA's promising finish and stage contracts on the A Route only as far as Grosvenor Station.

When the "B" package was presented to the board for approval, Alexandria became concerned because the C Route was not brought to operational status south of the city limits and they refused to participate in the funding of the "B" package until the C route was completed and made operational to Huntington Station in Fairfax County.

When Fairfax County learned that Maryland had conditioned its payments upon the award of certain A Route contracts by a time certain, Fairfax County refused to make its required local contributions, and the other Northern Virginia jurisdictions followed suit.

The parties met again and compromised their differences, with each getting substantially what they wanted —During these negotiations Fairfax County insisted upon and received a paragraph exonerating them from further liability.

Arlington County joined in that request, and both, by resolution, conditioned further contributions on the inclusion of the said paragraph in the proposed interim capital contributions agreement.

The demanded paragraph, No. 3, reads as follows—

> "No signatory of this Agreement shall be obligated to fund construction not included in this Agreement or to pay in excess of the amounts specified above, except for interest penalties in accordance with Paragraph 1 above. Funding of additional construction beyond that covered in this Agreement shall be dependent upon the adoption of a financial plan and a new or revised Capital Contributions Agreement."

The proposed interim agreement exhausts all internally generated funds held by WMATA and all interest to be earned.

The initial draft of the proposed interim agreement included the City of Fairfax as a party—When the City advised WMATA and the other signatories of its objections to the proposals contained therein, WMATA and the defendant political subdivisions deleted the City as a party and proceeded with having it approved without the consent of the City.

Before the interim agreement was approved, Mr. Patricelli of UMTA reminded WMATA that the region should complete alternates analyses on certain unbuilt segments of the system pursuant to the instructions of Congress in FY1977 DOT Appropriations Act—

"UMTA has determined that the following unbuilt segments should be so examined:

—J-H line (that portion beyond the yard site of Alexandria)

—B line (that portion beyond Silver Spring)

—F line (that portion beyond Anacostia Station) . . . ."

"Further, the question of alternatives analysis on the K line, beyond Glebe Road, should be left open pending the outcome of the decisions on I-66 now before the Secretary of Transportation." (Emphasis omitted)

Mr. Herrity of Fairfax County moved that the alternative studies include the K line from Glebe Road and that the ARS of the K line be changed to look at the feasibility of rerouting that line from East Falls Church via Tysons Corner to Dulles—The motion was adopted unanimously.

WMATA approved the interim capital contributions agreement and authorized its general manager to execute it on December 2, 1976.

Montgomery County approved the agreement on December 10, 1976, conditioned that Maryland's contributions be tied to construction programs in Maryland.

Mayor Washington of the District of Columbia made affidavit that he intended to sign the agreement.

The City of Alexandria voted not to approve the agreement on December 13, 1976.

Prince Georges County conditionally approved the agreement on December 21, 1976.

Arlington County conditionally approved the amended agreement on December 18, 1976.

The WMATA board struck paragraph 3, and again approved the proposed interim capital contributions agreement, as amended.

Alexandria again voted "No" on January 25, 1977.

The Court has been informed that all of the political subdivisions have now agreed to sign the proposed interim capital contributions agreement (some with conditions) but that the agreement has not as yet been executed.

Secretaries of Transportation Coleman and Adams and Governor Godwin of Virginia have agreed on the building of a modified I-66, with the median being used for the completion of the K line, and Virginia has agreed to make the right-of-way ready for the laying of the tracks and to the transfer of the Three Sisters Bridge/Highway funds.

This Court's injunction has been lifted—and the K Route can now be made operational.

The Court is satisfied upon the evidence presented that WMATA and the defendant political subdivisions have breached the January 9, 1970 revised capital contributions agreement.

The January 9th agreement is clear and unequivocal—Section 2.1 commands that WMATA shall construct and acquire the regional transit system substantially in accordance with the adopted ARS-1968 (Revised), as the same hereafter may from time to time be altered, revised or amended in accordance with the compact.[1] The system incorporated a design and construction schedule for the construction and operation of the transit system.

The interim capital contributions agreement materially alters and changes the design and construction schedule

[1] ARS-1968 (Revised) has not been altered, revised or amended in accordance with Section 15(c) of the compact.

for constructing and acquiring the said regional transit system—

> It accelerates the construction and insures the bringing to revenue operation Routes A, C, D and G and the B Route through Silver Spring and the K Route through Glebe Road, and delays completion of the remaining unfinished routes not mentioned therein.
>
> It accelerates and uses up all of the original Schedule A local capital contributions plus all of the internally generated funds, including those contributed by the City of Fairfax.
>
> It deletes all of the money heretofore allocated for the completion of the K Route beyond Glebe Road and makes no provision for the funding necessary for the completion of the remaining routes.

WMATA and the other defendant political subdivisions contend the interim agreement is nothing more than the name implies—a means of providing funds for construction during the interim before a formal call on the jurisdictions' pledges of "best efforts" can be made.

The Court reads the interim capital contributions agreement differently—The language used states rather clearly that the transferred interstate highway funds plus the 20 per cent local contributions shall be used only for "bringing to revenue operation" those routes mentioned in the agreement.

The agreement funds the completion of some of the routes at the expense of the remainder—and abrogates for all practical purposes the commands of Section 3.3 (a-e) of the January 9th agreement.

These subsections spell out the modus operandi for assuring the availability of funds to finance ARS-1968 (Revised).

The recomputations called for are necessary for invoking the "best efforts" requirement of Section 3.3(h).

The failure of WMATA to timely make these recomputations is a clear breach of the January 9th revised capital contributions agreement.

WMATA's defense that it would be senseless to attempt to make these recomputations without having all the needed information is not sustained by the record.

WMATA admits that it is charged with the duty of estimating the costs of completion—the adoption of a fair structure and making a financial plan for the completion and operation of the system.

They surely have more experience and know-how now than they had when they made the original cost estimates.

The alternatives analyses cost figures which WMATA falls back on as an excuse for not making the recomputations no doubt are now necessary if WMATA and the defendant political subdivisions are seriously considering truncating a portion of ARS-1968 (Revised)—but they were not needed when the recomputations were due because no such studies were then being considered.

WMATA's general counsel thought the recomputations should have been made when due—He twice recommended that the January 9th capital contributions agreement be amended to extend the time for making them.

There can be no question but that the K Route is the only route designed to serve the City of Fairfax—Terminating it at Glebe Road in Arlington makes the line unavailable to the residents of the City of Fairfax.

The interim agreement not only delays the completion of the K Route, it delays the completion of all the other uncompleted routes not mentioned therein until further financing is obtained—Further, the alternatives analyses

now being considered strongly suggest that some or all of the unfinished routes might be truncated for lack of sufficient moneys to complete them.

Although it is not conclusive that the interim capital contributions agreement is the final round of financing for the Metrorail construction and that the routes not included therein are to be truncated, it is debatable to say the least.

Arlington and Fairfax Counties have expressly stated that they could not make any further capital contribution commitments absent voter approval and that they did not know what their voters would do.

If all of the local jurisdictions are as firmly committed to complete the system as they would have the City of Fairfax believe, there is no need or justification for making the alternatives analyses studies.

All of the jurisdictions, with the exception of the City of Fairfax—and possibly Fairfax County—will have gotten practically all of the routes originally scheduled for their jurisdictions brought to operational status under the interim agreement.

The City of Fairfax is the only jurisdiction that has paid all of its share of capital contributions—and it is in danger of getting very little for its money if the K route is terminated at Glebe Road or rerouted to Tysons Corner as suggested.

The Court reads the original capital contributions agreement as requiring the consent of all parties for the making of any changes.

All of the parties so construed the agreement until the City of Fairfax refused consent to the interim capital contributions agreement.

All changes in the design and construction schedule made prior to the date of the interim agreement were approved and consented to by all of the parties.

The general counsel for WMATA required the consent of all of the parties for the changing of the dates for the making of the recomputations.

The WMATA board of directors and their general manager apparently were of the opinion that the consent of all of the parties was needed for the adoption of the interim capital contributions agreement—They made the City of Fairfax a party in the first draft—and it was not until the City refused to give its consent that WMATA and the remaining defendant political subdivisions proceeded to approve and agree to sign the interim agreement without the City.

In so doing they have rather effectively circumvented, altered and/or modified the construction, financing and recomputations of the original capital contributions agreement.

By so doing they have subjected themselves to the penalties flowing from the breaches of the agreement.

The City of Fairfax seeks specific performance—It insists it wants the K Route completed. In the alternative, it asks for damages in an amount equal to the amount of its capital contributions plus interest.

The Court agrees with counsel for WMATA that the appropriate remedy in this case is damages rather than an order compelling the construction of the K Route.

Therefore the Court will deny the City's prayer for an injunction.

Since it now appears, according to counsel for WMATA, that the completion of the K Route is "nearly

inevitable," [2] the Court will defer fixing the date for the hearing on damages for a period of sixty days from the date hereof so that the parties may amend the interim capital contributions agreement to insure the completion of the K Route, if they be so advised, and

It Is So Ordered and Decreed.

The Clerk will send a copy of this memorandum opinion and order to all counsel of record.

/s/ Oren R. Lewis
United States Senior
District Judge

February 25, 1977

[2] Secretary Coleman and Governor Godwin have agreed on the completion of a modified I-66.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

[Filed, May 27, 1977, Clerk, U.S. District Court, Alexandria, Virginia]

Civil Action No. 76-918-A

CITY OF FAIRFAX, VIRGINIA,
Plaintiff

v.

WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY, ET AL.,
Defendants

MEMORANDUM OPINION AND ORDER

This cause came on again for hearing on the amount of damages, if any, to be awarded the City of Fairfax.

This Court first heard and denied the defendants' motion to rescind its memorandum opinion and order of February 25, 1977 and WMATA's motion to dismiss the plaintiff's claim for relief.

This Court has heretofore found that WMATA and the defendant political subdivisions had breached the January 9, 1970 revised capital contributions agreement—and had allocated all of the original Schedule A capital contributions plus all of the internally generated funds, including those contributed by the City of Fairfax for completion of the routes mentioned in the interim capital contributions agreement.

Fairfax had paid all of its original Schedule A local capital contributions—The interim capital contributions agreement terminated the K Route in Arlington County—

and most, if not all, of the defendant political subdivisions have made it abundantly clear that they would not contribute to construction [of Metro routes] not included in the interim agreement unless they deemed it to be of benefit to their political subdivisions.

This Court has heretofore agreed with counsel for WMATA that the remedy in this case is damages rather than an order compelling completion of the K Route—and has delayed this hearing to permit the parties to make arrangements for the completion of the K Route if they be so advised.

The defendants have refused to officially state what, if anything, they intend to do to assure the completion of the K Route—Their counsel say it all depends on the fate of I-66.

The completion of I-66 was not included in the 1970 capital contributions agreement—It was not even mentioned—The City of Fairfax paid its agreed capital contributions on the written assurance of WMATA and the defendant political subdivisions that they would not reduce the facilities serving the City without its consent.

The defendants have not only reduced the facilities serving the City—they have terminated the only route designed to serve the City, some ten or twelve miles from its original terminus. This considerably lessened the benefits the residents of the City had a right to expect.

Fairfax City wants its capital contributions returned with interest, together with release from its agreement to indemnify the federal government upon its payment of the revenue bonds; and indemnification of all losses, if any, it may sustain in re the acquisition, construction and operation of the Regional Rail Transit System.

WMATA says the return of the City's capital contributions should be reduced in proportion to the benefits it

will receive from the sixty-mile system—and that interest on the amount refunded should be computed from the date of judgment, not from the date the payments were made.

The District of Columbia takes the position the Court cannot assess damages against it—To do so would be an unconstitutional usurpation of the legislative power of Congress.

Arlington and Fairfax Counties take the position that the City of Fairfax has failed to prove its damages with reasonable certainty—They also claim damages should not be assessed against them because they could not have constitutionally incurred contractual obligations to pay damages to the City of Fairfax if the K Line were not built.

The City of Alexandria says that the return of Fairfax City's capital contributions, if warranted, should be computed on the basis of the miles completed compared with the miles contracted for, namely, 60 to 98.

WMATA suggests that the Court use the same formula for computing the return of capital contributions as provided for in computing the Schedule A capital contributions due from each member of the compact.

The Maryland counties, in addition to adopting what the other defendants had to say, urge that they did not do anything to make them liable for the return of any of Fairfax City's capital contributions in the event the K Line was not completed as originally called for—In addition, Prince Georges County claims that the individually named defendants ought to be dismissed.

The Court has considered the contentions of all of the defendants, and is of the opinion that WMATA and all of the political subdivisions are jointly and severally liable for the damages flowing from the breach of the January 9, 1970 revised capital contributions agreement.

There is not enough evidence to hold any of the named individuals personally liable for Fairfax City's losses—They are hereby dismissed.

The breach in this case occurred when WMATA approved the interim capital contributions agreement on December 2, 1976. That amendment terminated the K Route at Glebe Road in Arlington—a substantial reduction in facilities serving the City of Fairfax.

Although the City of Fairfax did not get all it contracted for, its residents will derive some benefit from the now guaranteed sixty-mile Rapid Transit System.

To say the least, travel time and expense to and from downtown Washington and the adjacent Maryland and Virginia counties will be reduced.

The right of restitution is not limited to rescission cases but is an appropriate measure of recovery for breach of contract, regardless of whether there is a rescission of the contract. See Dobbs, The Law of Remedies, §§ 4.1 and 12.1 (1973), wherein it is stated—

> Restitution is generally awarded when the defendant has gained a benefit that it would be unjust for him to keep, though he gained it honestly. Thus, the defendant who breaches his contract with the plaintiff, even though forced to do so by circumstances, may be compelled to make restitution of any benefits he had received from the plaintiff under the contract.

See also 22 Am.Jur.2d § 46 (1965).

Although restitution is an appropriate measure of damages in a case such as this, it does not follow that the City of Fairfax is entitled to the return of all of its contributions plus interest at 8% per annum from the date of the payments.

It would be just as unjust under these circumstances for the City to get back all of its capital contributions

plus interest as it would for the defendants to retain all of the City's capital contributions.

Even though the value of the benefits received cannot be computed with mathematical certainty, they can be offset by not awarding interest [1] on the City's contributions prior to the date of the breach.

Therefore the City of Fairfax will be awarded judgment in the sum of $1,990,859.92, with interest at 8% per annum from December 2, 1976 until paid.

Fairfax City's prayer for relief from all other losses, if any it might sustain, flowing from the acquisition, construction and operation of the Regional Rapid Transit System is premature—Therefore the requested relief is denied, without prejudice to the City's right to assert any defense thereto it might have if and when it is sued in the premises.

Counsel for the City of Fairfax will prepare an appropriate judgment order, submit it to counsel for the defendants for approval as to form, and then to the Court for entry.

The Clerk will send a copy of this memorandum opinion and order to all counsel of record.

/s/ Oren R. Lewis
United States Senior
District Judge

May 27, 1977

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[1] The award of interest prior to judgment is discretionary with the Court.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY COMPACT

Pub. L. 89-774, 80 Stat. 1324 (1966).

AN ACT

To grant the consent of Congress for the States of Virginia and Maryland and the District of Columbia to amend the Washington Metropolitan Area Transit Regulation Compact to establish an organization empowered to provide transit facilities in the National Capital Region and for other purposes and to enact said amendment for the District of Columbia.

Whereas Congress heretofore has declared in the National Capital Transportation Act of 1960 (Public Law 86-669, 74 Stat. 537) and in the National Capital Transportation Act of 1965 (Public Law 89-173, 79 Stat. 663) that a coordinated system of rail rapid transit, bus transportation service, and highways is essential in the National Capital Region for the satisfactory movement of people and goods, the alleviation of present and future traffic congestion, the economic welfare and vitality of all parts of the Region, the effective performance of the functions of the United States Government located within the Region, the orderly growth and development of the Region, the comfort and convenience of the residents and visitors to the Region, and the preservation of the beauty and dignity of the Nation's Capital and that such a system should be developed cooperatively by the Federal, State, and local governments of the National Capital Region, with the costs of the necessary facilities financed, as far as possible, by persons using or benefiting from such facilities and the remaining costs shared equitably among the Federal, State, and local governments;

Whereas in furtherance of this policy, Congress, in title III of the National Capital Transportation Act of 1960,

authorized the District of Columbia, the Commonwealth of Virginia, and the State of Maryland to negotiate a Compact for the establishment of an organization, empowered, inter alia, to provide regional transportation facilities;

Whereas, it is the sense of the Congress that the Mass Transit Plan authorized by the Compact and this Act shall conform to the fullest extent practicable with the Comprehensive Plan for the National Capital and the general plan for the development of the National Capital Region prepared pursuant to the National Capital Planning Act of 1952 (Public Law 82-592, 66 Stat. 781); and

Whereas, the District of Columbia, the Commonwealth of Virginia and the State of Maryland, with a representative of the United States appointed by the President, have negotiated such a Compact, known as the Washington Metropolitan Area Transit Authority Compact, which amends the Washington Metropolitan Area Transit Regulation Compact, heretofore consented to by the Congress (Public Law 86-794, 74 Stat. 1031, as amended by Public Law 87-767, 76 Stat. 764), by adding thereto a title III and said Compact has been enacted by Maryland (Ch. 869, Acts of General Assembly 1965) and in substantially the same language by Virginia (Ch. 2, 1966 Acts of Assembly): Now, therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Congress hereby consents to, adopts and enacts for the District of Columbia an amendment to the Washington Metropolitan Area Transit Regulation Compact, for which Congress heretofore has granted its consent (Public Law 86-794, 74 Stat. 1031, as amended by Public Law 87-767, 76 Stat. 764) by adding thereto title III, known as the Washington Metropolitan Area Transit Authority Compact (herein referred to as title III), substantially as follows:

"TITLE III

"ARTICLE I

"DEFINITIONS

"1. As used in this Title, the following words and terms shall have the following meanings, unless the context clearly requires a different meaning:

"(a) 'Board' means the Board of Directors of the Washington Metropolitan Area Transit Authority;

"(b) 'Director' means a member of the Board of Directors of the Washington Metropolitan Area Transit Authority;

"(c) 'Private transit companies' and 'private carriers' means corporations, persons, firms or associations rendering transit service within the Zone pursuant to a certificate of public convenience and necessity issued by the Washington Metropolitan Area Transit Commission or by a franchise granted by the United States or any signatory party to this Title;

"(d) 'Signatory' means the State of Maryland, the Commonwealth of Virginia and the District of Columbia;

"(e) 'State' includes District of Columbia;

"(f) 'Transit facilities' means all real and personal property located in the Zone, necessary or useful in rendering transit service between points within the Zone, by means of rail, bus, water or air and any other mode of travel, including without limitation, tracks, rights of way, bridges, tunnels, subways, rolling stock for rail, motor vehicle, marine and air transportation, stations, terminals and ports, areas for parking and all equipment, fixtures, buildings and structures and services incidental to or required in connection with the performance of transit service;

"(g) 'Transit services' means the transportation of persons and their packages and baggage by means of transit facilities between points within the Zone and includes the transportation of newspapers, express and mail between such points but does not include taxicab, sightseeing or charter service; and

"(h) 'WMATC' means Washington Metropolitan Area Transit Commission.

"ARTICLE II

"PURPOSE AND FUNCTIONS

"Purpose

"2. The purpose of this Title is to create a regional instrumentality, as a common agency of each signatory party, empowered, in the manner hereinafter set forth, (1) to plan, developed, finance and cause to be operated improved transit facilities, in coordination with transportation and general development planning for the Zone, as part of a balanced regional system of transportation, utilizing to their best advantage the various modes of transportation, (2) to coordinate the operation of the public and privately owned or controlled transit facilities, to the fullest extent practicable, into a unified regional transit system without unnecessary duplicating service, and (3) to serve such other regional purposes and to perform such other regional functions as the signatories may authorize by appropriate legislation.

"ARTICLE III

"ORGANIZATION AND AREA

"Washington Metropolitan Area Transit Zone

"3. There is hereby created the Washington Metropolitan Area Transit Zone which shall embrace the District of Columbia, the cities of Alexandria, Falls Church and Fairfax and the counties of Arlington and Fairfax and

political subdivisions of the Commonwealth of Virginia located within those counties, and the counties of Montgomery and Prince George's in the State of Maryland and political subdivisions of the State of Maryland located in said counties.

"Washington Metropolitan Area Transit Authority

"4. There is hereby created, as an instrumentality and agency of each of the signatory parties hereto, the Washington Metropolitan Area Transit Authority which shall be a body corporate and politic, and which shall have the powers and duties granted herein and such additional powers as may hereafter be conferred upon it pursuant to law.

"Board Membership

"5. (a) The Authority shall be governed by a Board of six Directors consisting of two Directors for each signatory. For Virginia, the Directors shall be appointed by the Northern Virginia Transportation Commission; for the District of Columbia, by the Commissioners of the District of Columbia; and for Maryland, by the Washington Suburban Transit Commission. In each instance the Director shall be appointed from among the members of the appointing body and shall serve for a term coincident with his term on the body by which he was appointed. A Director may be removed or suspended from office only as provided by the law of the signatory from which he was appointed. The appointing authorities shall also appoint an alternate for each Director, who may act only in the absence of the Director for whom he has been appointed an alternate, and each alternate shall serve at the pleasure of the appointing authority. In the event of a vacancy in the Office of Director or alternate, it shall be filled in the same manner as an original appointment.

"(b) Before entering upon the duties of his office each Director and alternate director shall take and subscribe

to the following oath (or affirmation) of office or any such other oath or affirmation, if any, as the Constitution or laws of the signatory he represents shall provide:

"'I, ..., hereby solemnly swear (or affirm) that I will support and defend the Constitution of the United States and the Constitution and Laws of the state or political jurisdiction from which I was appointed as a director (alternate director) of the Board of Washington Metropolitan Area Transit Authority and will faithfully discharge the duties of the office upon which I am about to enter.'

"Compensation of Directors and Alternates

"6. Members of the Board and alternates shall serve without compensation but may be reimbursed for necessary expenses incurred as an incident to the performance of their duties.

"Organization and Procedure

"7. The Board shall provide for its own organization and procedure. It shall organize annually by the election of a Chairman and Vice-Chairman from among its members. Meetings of the Board shall be held as frequently as the Board deems that the proper performance of its duties requires and the Board shall keep minutes of its meetings. The Board shall adopt rules and regulations governing its meeting, minutes and transactions.

"Quorum and Actions by the Board

"8. (a) Four Directors or alternates consisting of at least one Director or alternate appointed from each Signatory, shall constitute a quorum and no action by the Board shall be effective unless a majority of the Board, which majority shall include at least one Director or alternate from each Signatory, concur therein; provided,

however, that a plan of financing may be adopted or a mass transit plan adopted, altered, revised or amended by the unanimous vote of the Directors representing any two Signatories.

"(b) The actions of the Board shall be expressed by motion or resolution. Actions dealing solely with internal management of the Authority shall become effective when directed by the Board, but no other action shall become effective prior to the expiration of thirty days following its adoption; provided, however, that the Board may provide for the acceleration of any action upon a finding that such acceleration is required for the proper and timely performance of its functions.

"Officers

"9. (a) The officers of the Authority, none of whom shall be members of the Board, shall consist of a general manager, a secretary, a treasurer, a comptroller and a general counsel and such other officers as the Board may provide. Except for the office of general manager and comptroller, the Board may consolidate any of such other offices in one person. All such officers shall be appointed and may be removed by the Board, shall serve at the pleasure of the Board and shall perform such duties and functions as the Board shall specify. The Board shall fix and determine the compensation to be paid to all officers and, except for the general manager who shall be a full-time employee, all other officers may be hired on a full-time or part-time basis and may be compensated on a salary or fee basis, as the Board may determine. All employees and such officers as the Board may designate shall be appointed and removed by the general manager under such rules of procedure and standards as the Board may determine.

"(b) The general manager shall be the chief administrative officer of the Authority and, subject to policy

direction by the Board, shall be responsible for all activities of the Authority.

"(c) The treasurer shall be the custodian of the funds of the Authority, shall keep an account of all receipts and disbursements and shall make payments only upon warrants duly and regularly signed by the Chairman or Vice-Chairman of the Board, or other person authorized by the Board to do so, and by the secretary or general manager; provided, however, that the Board may provide that warrants not exceeding such amounts or for such purposes as may from time to time be specified by the Board may be signed by the general manager or by persons designated by him.

"(d) An oath of office in the form set out in Section 5(b) of this Article shall be taken, subscribed and filed with the Board by all appointed officers.

"(e) Each Director, officer and employees specified by the Board shall give such bond in such form and amount as the Board may require, the premium for which shall be paid by the Authority.

"Conflict of Interests

"10. (a) No Director, officer or employee shall:

"(1) be financially interested, either directly or indirectly, in any contract, sale, purchase, lease or transfer of real or personal property to which the Board or the Authority is a party;

"(2) in connection with services performed within the scope of his official duties, solicit or accept money or any other thing of value in addition to the compensation or expenses paid to him by the Authority;

"(3) offer money or any thing of value for or in consideration of obtaining an appointment, promotion or privilege in his employment with the Authority.

"(b) Any Director, officer or employee who shall willfully violate any provision of this section shall, in the discretion of the Board, forfeit his office or employment.

"(c) Any contract or agreement made in contravention of this section may be declared void by the Board.

"(d) Nothing in this section shall be construed to abrogate or limit the applicability of any federal or state law which may be violated by any action prescribed by this section.

"ARTICLE IV

"PLEDGE OF COOPERATION

"11. Each Signatory pledges to each other faithful cooperation in the achievement of the purposes and objects of this Title.

"ARTICLE V

"GENERAL POWERS

"Enumeration

"12. In addition to the powers and duties elsewhere described in this Title, and except as limited in this Title, the Authority may:

"(a) Sue and be sued;

"(b) Adopt and use a corporate seal and alter the same at pleasure;

"(c) Adopt, amend, and repeal rules and regulations respecting the exercise of the powers conferred by this Title;

"(d) Construct, acquire, own, operate, maintain, control, sell and convey real and personal property and any interest therein by contract, purchase, condemnation, lease, license, mortgage or otherwise but all of said property shall be located in the Zone and shall be necessary or useful in rendering transit service or in activities incidental thereto;

"(e) Receive and accept such payments, appropriations, grants, gifts, loans, advances and other funds, properties and services as may be transferred or made available to it by any signatory party, any political subdivision or agency thereof, by the United States, or by any agency thereof, or by any other public or private corporation or individual, and enter into agreements to make reimbursement for all or any part thereof;

"(f) Enter into and perform contracts, leases and agreements with any person, firm or corporation or with any political subdivision or agency of any signatory party or with the federal government, or any agency thereof, including, but not limited to, contracts or agreements to furnish transit facilities and service;

"(g) Create and abolish offices, employments and positions (other than those specifically provided for herein) as it deems necessary for the purposes of the Authority, and fix and provide for the qualification, appointment, removal, term, tenure, compensation, pension and retirement rights of its officers and employees without regard to the laws of any of the signatories;

"(h) Establish, in its discretion, a personnel system based on merit and fitness and, subject to eligibility, participate in the pension and retirement plans of any signatory, or political subdivision or agency thereof, upon terms and conditions mutually acceptable;

"(i) Contract for or employ any professional services;

"(j) Control and regulate the use of facilities owned or controlled by the Authority, the service to be rendered and the fares and charges to be made therefor;

"(k) Hold public hearings and conduct investigations relating to any matter affecting transportation in the

Zone with which the Authority is concerned and, in connection therewith, subpena witnesses, papers, records and documents; or delegate such authority to any officer. Each director may administer oaths or affirmations in any proceeding or investigation;

"(l) Make or participate in studies of all phases and forms of transportation, including transportation vehicle research and development techniques and methods for determining traffic projections, demand motivations, and fiscal research and publicize and make available the results of such studies and other information relating to transportation; and

"(m) Exercise, subject to the limitations and restrictions herein imposed, all powers reasonably necessary or essential to the declared objects and purposes of this Title.

"ARTICLE VI

"PLANNING

"Mass Transit Plan

"13. (a) The Board shall develop and adopt, and may from time to time review and revise, a mass transit plan for the immediate and long-range needs of the Zone. The mass transit plan shall include one or more plans designating (1) the transit facilities to be provided by the Authority, including the locations of terminals, stations, platforms, parking facilities and the character and nature thereof; (2) the design and location of such facilities; (3) whether such facilities are to be constructed or acquired by lease, purchase or condemnation; (4) a timetable for the provision of such facilities; (5) the anticipated capital costs; (6) estimated operating expenses and revenues relating thereto; and (7) the various other factors and considerations, which, in the opinion of the Board, justify and require the projects therein proposed. Such plan shall specify the type of equipment to be

utilized, the areas to be served, the routes and schedules of service expected to be provided and the probable fares and charges therefor.

"(b) In preparing the mass transit plan, and in any review of revision thereof, the Board shall make full utilization of all data, studies, reports and information available from the National Capital Transportation Agency and from any other agencies of the federal government, and from signatories and the political subdivisions thereof.

"Planning Process

"14. (a) The mass transit plan, and any revisions, alterations or amendments thereof, shall be coordinated, through the procedures hereinafter set forth, with

"(1) other plans and programs affecting transportation in the Zone in order to achieve a balanced system of transportation, utilizing each mode to its best advantage;

"(2) the general plan or plans for the development of the Zone; and

"(3) the development plans of the various political subdivisions embraced within the Zone.

"(b) It shall be the duty and responsibility of each member of the Board to serve as liaison between the Board and the body which appointed him to the Board. To provide a framework for regional participation in the planning process, the Board shall create technical committees concerned with planning and collection and analyses of data relative to decision-making in the transportation planning process and the Commissioners of the District of Columbia, the component governments of the Northern Virginia Transportation District and the Washington Suburban Transit District shall appoint representatives to such technical committees and otherwise

cooperate with the Board in the formulation of a mass transit plan, or in revisions, alterations or amendments thereof.

"(c) The Board, in the preparation, revision, alteration or amendment of a mass transit plan, shall

"(1) consider data with respect to current and prospective conditions in the Zone, including, without limitation, land use, population, economic factors affecting development plans, goals or objectives for the development of the Zone and the separate political subdivisions, transit demands to be generated by such development, travel patterns, existing and proposed transportation and transit facilities, impact of transit plans on the dislocation of families and businesses, preservation of the beauty and dignity of the Nation's Capital, factors affecting environmental amenities and aesthetics and financial resources;

"(2) cooperate with and participate in any continuous, comprehensive transportation planning process cooperatively established by the highway agencies of the signatories and the local political subdivisions in the Zone to meet the planning standards now or hereafter prescribed by the Federal-Aid Highway Acts; and

"(3) to the extent not inconsistent with or duplicative of the planning process specified in subparagraph (2) of this paragraph (c), cooperate with the National Capital Planning Commission, the National Capital Regional Planning Council, the Washington Metropolitan Council of Governments, the Washington Metropolitan Area Transit Commission, the highway agencies of the Signatories, the Maryland-National Capital Park and Planning Commission, the Northern Virginia Regional Planning and Economic Development Commission, the Maryland State Planning Department and the Commission of Fine Arts. Such cooperation shall include the creation, as necessary, of technical committees composed of personnel, appointed by such agencies, concerned with planning and collection and analysis of data relative to decision-making in the transportation planning process.

"Adoption of Mass Transit Plan

"15. (a) Before a mass transit plan is adopted, altered, revised or amended, the Board shall transmit such proposed plan, alteration, revision or amendment for comment to the following and to such other agencies as the Board shall determine:

"(1) the Commissioners of the District of Columbia, the Northern Virginia Transportation Commission and the Washington Suburban Transit Commission;

"(2) the governing bodies of the Counties and Cities embraced within the Zone;

"(3) the highway agencies of the Signatories;

"(4) the Washington Metropolitan Area Transit Commission;

"(5) the Washington Metropolitan Council of Governments;

"(6) the National Capital Planning Commission;

"(7) The National Capital Regional Planning Council;

"(8) the Maryland-National Capital Park and Planning Commission;

"(9) the Northern Virginia Regional Planning and Economic Development Commission;

"(10) the Maryland State Planning Department; and

"(11) the private transit companies operating in the Zone and the Labor Unions representing the em-

ployees of such companies and employees of contractors providing service under operating contracts.

"Information with respect thereto shall be released to the public. A copy of the proposed mass transit plan, amendment or revision, shall be kept at the office of the Board and shall be available for public inspection. After thirty days' notice published once a week for two successive weeks in one or more newspapers of general circulation within the Zone, a public hearing shall be held with respect to the proposed plan, alteration, revision or amendment. The thirty days' notice shall begin to run on the first day the notice appears in any such newspaper. The Board shall consider the evidence submitted and statements and comments made at such hearing and may make any changes in the proposed plan, amendment or revision which it deems appropriate and such changes may be made without further hearing.

"ARTICLE VII

"FINANCING

"Policy

"16. With due regard for the policy of Congress for financing a mass transit plan for the Zone set forth in Section 204(g) of the National Capital Transportation Act of 1960 (74 Stat. 537), it is hereby declared to be the policy of this Title that, as far as possible, the payment of all costs shall be borne by the persons using or benefiting from the Authority's facilities and services and any remaining costs shall be equitably shared among the federal, District of Columbia and participating local governments in the Zone. The allocation among such governments of such remaining costs shall be determined by agreement among them and shall be provided in the manner hereinafter specified.

"Plan of Financing

"17. (a) The Authority, in conformance with said policy, shall prepare and adopt a plan for financing the construction, acquisition, and operation of facilities specified in a mass transit plan adopted pursuant to Article VI hereof, or in any alteration, revision or amendment thereof. Such plan of financing shall specify the facilities to be constructed or acquired, the cost thereof, the principal amount of revenue bonds, equipment trust certificates, and other evidences of debt proposed to be issued, the principal terms and provisions of all loans and underlying agreements and indentures, estimated operating expenses and revenues, and the proposed allocation among the federal, District of Columbia, and participating local governments of the remaining costs and deficits, if any, and such other information as the Commission may consider appropriate.

"(b) Such plan of financing shall constitute a proposal to the interested governments for financial participation and shall not impose any obligation on any government and such obligations shall be created only as provided in Section 18 of this Article VII.

"Commitments for Financial Participation

"18. (a) Commitments on behalf of the portion of the Zone located in Virginia shall be by contract or agreement by the Authority with the Northern Virginia Transportation District, or its component governments, as authorized in the Transportation District Act of 1964 (Ch. 631, 1964 Acts of Virginia Assembly), to contribute to the capital required for the construction and/or acquisition of facilities specified in a mass transit plan adopted as provided in Article VI, or any alteration, revision or amendment thereof, and for meeting expenses and obligations in the operation of such facilities. No such contract or agreement, however, shall be entered into by the Au-

thority with the Northern Virginia Transportation District unless said District has entered into the contracts or agreements with its member governments, as contemplated by Section 1(b)(4) of Article 4 of said Act, which contracts or agreements expressly provide that such contracts or agreements shall inure to the benefit of the Authority and shall be enforceable by the Authority in accordance with the provisions of Section 2, Article 5 of said Act, and such contracts or agreements are acceptable to the Board. The General Assembly of Virginia hereby authorizes and designates the Authority as the agency to plan for and provide transit facilities and services for the area of Virginia encompassed within the Zone within the contemplation of Article 1, Section 3(c) of said Act.

"(b) Commitments on behalf of the portion of the Zone located in Maryland shall be by contract or agreement by the Authority with the Washington Suburban Transit District, pursuant to which the Authority undertakes to provide transit facilities and service in consideration for the agreement by said District to contribute to the capital required for the construction and/or acquisition of facilities specified in a mass transit plan adopted as provided in Article VI, or in any alteration, revision or amendment thereof, and for meeting expenses and obligations incurred in the operation of such facilties.

"(c) With respect to the District of Columbia and the federal government, the commitment or obligation to render financial assistance shall be created by appropriation or in such other manner, or by such other legislation, as the Congress shall determine. If prior to making such commitment by or on behalf of the District of Columbia, legislation is enacted by the Congress granting the governing body of the District of Columbia plenary power to create obligations and levy taxes, the commitment by the District of Columbia shall be by con-

tract or agreement between the governing body of the District of Columbia and the Authority, pursuant to which the Authority undertakes, subject to the provisions of Section 20 hereof, to provide transit facilities and service in consideration for the undertaking by the District of Columbia to contribute to the capital required for the construction and/or acquisition of facilities specified in a mass transit plan adopted as provided in Article VI, or in any alteration, revision or amendment thereof, and for meeting expenses and obligations incurred in the operation of such facilities.

"Administrative Expenses

"19. Prior to the time the Authority has receipts from appropriations and contracts or agreements as provided in Section 18 of this Article VII, the expenses of the Authority for administration and for preparation of a mass transit and financing plan, including all engineering, financial, legal and other services required in connection therewith, shall, to the extent funds for such expenses are not provided through grants by the federal government, be borne by the District of Columbia, by the Washington Suburban Transit District and the component governments of the Northern Virginia Transportation District. Such expenses shall be allocated among such governments on the basis of population as reflected by the latest available population statistics of the Bureau of the Census; provided, however, that upon the request of any Director the Board shall make the allocation upon estimates of population acceptable to the Board. The allocations shall be made by the Board and shall be included in the annual current expense budget prepared by the Board.

"Acquisition of Facilities from Federal or Other Agencies

"20. (a) The Authority is authorized to acquire by purchase, lease or grant or in any manner other than

condemnation, from the federal government, or any agency thereof, from the District of Columbia, Maryland or Virginia, or any political subdivision or agency thereof, any transit and related facilities, including real and personal property and all other assets, located within the Zone, whether in operation or under construction. Such acquisition shall be made upon such terms and conditions as may be agreed upon and subject to such authorization or approval by the Congress and the governing body of the District of Columbia, as may be required; provided, however, that if such acquisition imposes or may impose any further or additional obligation or liability upon the Washington Suburban Transit District, the Northern Virginia Transportation District, or any component government thereof, under any contract with the Authority, the Authority shall not make such acquisition until any such affected contract has been appropriately amended.

"(b) For such purpose, the Authority is authorized to assume all liabilities and contracts relating thereto, to assume responsibility as primary obligor, endorser or guarantor on any outstanding revenue bonds, equipment trust certificates or other form of indebtedness authorized in this Act issued by such predecessor agency or agencies and, in connection therewith, to become a party to, and assume the obligations of, any indenture or loan agreement underlying or issued in connection with any outstanding securities or debts.

"Temporary Borrowing

"21. The Board may borrow, in anticipation of receipts, from any signatory, the Washington Suburban Transit District, the Northern Virginia Transportation District, or any component government thereof, or from any lending institution for any purposes of this Title, including administrative expenses. Such loans shall be

for a term not to exceed two years and at a rate of interest not to exceed six percent per annum. The signatories and any such political subdivision or agency may, in its discretion, make such loans from any available money.

"Funding

"22. The Board shall not construct or acquire any of the transit facilities specified in a mass transit plan adopted pursuant to the provisions of Article VI of this Title, or in any alteration, revision or amendment thereof, nor make any commitments or incur any obligations with respect thereto until funds are available therefor.

"ARTICLE VIII

"BUDGET

"Capital Budget

"23. The Board shall annually adopt a capital budget, including all capital projects it proposes to undertake or continue during the budget period, containing a statement of the estimated cost of each project and the method of financing thereof.

"Current Expense Budget

"24. The Board shall annually adopt a current expense budget for each fiscal year. Such budget shall include the Board's estimated expenditures for administration, operation, maintenance and repairs, debt service requirements and payments to be made into any funds required to be maintained. The total of such expenses shall be balanced by the Board's estimated revenues and receipts from all sources, excluding funds included in the capital budget or otherwise earmarked for other purposes.

"Adoption and Distribution of Budgets

"25. (a) Following the adoption by the Board of annual capital and current expense budgets, the general

manager shall transmit certified copies of such budgets to the principal budget officer of the federal government, the District of Columbia, the Washington Suburban Transit District and of the component governments of the Northern Virginia Transportation Commission at such time and in such manner as may be required under their respective budgetary procedures.

"(b) Each budget shall indicate the amounts, if any, required from the federal government, the Government of the District of Columbia, the Washington Suburban Transit District and the component governments of the Northern Virginia Transportation District, determined in accordance with the commitments made pursuant to Article VII, Section 18 of this Title, to balance each of said budgets.

"Payments

"26. Subject to such review and approval as may be required by their budgetary or other applicable processes, the federal government, the Government of the District of Columbia, the Washington Suburban Transit District and the component governments of the Northern Virginia Transportation District shall include in their respective budgets next to be adopted and appropriate or otherwise provide the amounts certified to each of them as set forth in the budgets.

"ARTICLE IX

"REVENUE BONDS

"Borrowing Power

"27. The Authority may borrow money for any of the purposes of this Title, may issue its negotiable bonds and other evidences of indebtedness in respect thereto and may mortgage or pledge its properties, revenues and contracts as security therefor.

"All such bonds and evidences of indebtedness shall be payable solely out of the properties and revenues of the Authority. The bonds and other obligations of the Authority, except as may be otherwise provided in the indenture under which they were issued, shall be direct and general obligations of the Authority and the full faith and credit of the Authority are hereby pledged for the prompt payment of the debt service thereon and for the fulfillment of all other undertakings of the Authority assumed by it to or for the benefit of the holders thereof.

"Funds and Expenses

"28. The purposes of this Title shall include, without limitation, all costs of any project or facility or any part thereof, including interest during a period of construction and for a period not to exceed two years thereafter and any incidental expenses (legal, engineering, fiscal, financial, consultant and other expenses) connected with issuing and disposing of the bonds; all amounts required for the creation of an operating fund, construction fund, reserve fund, sinking fund, or other special fund; all other expenses connected with administration, the planning, design, acquisition, construction, completion, improvement or reconstruction of any facility or any part thereof; and reimbursement of advances by the Board or by others for such purposes and for working capital.

"Credit Excluded; Officers, State, Political Subdivisions and Agencies

"29. The Board shall have no power to pledge the credit of any signatory party, political subdivision or agency thereof, or to impose any obligation for payment of the bonds upon any signatory party, political subdivision or agency thereof, but may pledge the contracts of such governments and agencies; provided, however, that the bonds may be underwritten in whole or in part as to

principal and interest by the United States, or by any political subdivision or agency of any signatory; provided, further, that any bonds underwritten in whole or in part as to principal and interest by the United States shall not be issued without approval of the Secretary of the Treasury. Neither the Directors nor any person executing the bonds shall be liable personally on the bonds of the Authority or be subject to any personal liability or accountability by reason of the issuance thereof.

"Funding and Refunding

"30. Whenever the Board deems it expedient, it may fund and refund the bonds and other obligations of the Authority whether or not such bonds and obligations have matured. It may provide for the issuance, sale or exchange of refunding bonds for the purpose of redeeming or retiring any bonds (including the payment of any premium, duplicate interest or cash adjustment required in connection therewith) issued by the Authority or issued by any other issuing body, the proceeds of the sale of which have been applied to any facility acquired by the Authority or which are payable out of the revenues of any facility acquired by the Authority. Bonds may be issued partly to refund bonds and other obligations then outstanding, and partly for any other purpose of the Authority. All provisions of this Title applicable to the issuance of bonds are applicable to refunding bonds and to the issuance, sale or exchange thereof.

"Bonds; Authorization Generally

"31. Bonds and other indebtedness of the Authority shall be authorized by resolution of the Board. The validity of the authorization and issuance of any bonds by the Authority shall not be dependent upon nor affected in any way by: (i) the disposition of bond proceeds by the Board or by contract, commitment or action taken with

respect to such proceeds; or (ii) the failure to complete any part of the project for which bonds are authorized to be issued. The Authority may issue bonds in one or more series and may provide for one or more consolidated bond issues, in such principal amounts and with such terms and provisions as the Board may deem necessary. The bonds may be secured by a pledge of all or any part of the property, revenues and franchises under its control. Bonds may be issued by the Authority in such amount, with such maturities and in such denominations and form or forms, whether coupon or registered, as to principal alone or as to both principal and interest, as may be determined by the Board. The Board may provide for redemption of bonds prior to maturity on such notice and at such time or times and with such redemption provisions, including premiums, as the Board may determine.

"Bonds; Resolutions and Indentures Generally

"32. The Board may determine and enter into indentures or adopt resolutions providing for the principal amount, date or dates, maturities, interest rate, or rates, denominations, form, registration, transfer, interchange and other provisions of the bonds and coupons and the terms and conditions upon which the same shall be executed, issued, secured, sold, paid, redeemed, funded and refunded. The resolution of the Board authorizing any bond or any indenture so authorized under which the bonds are issued may include all such covenants and other provisions not inconsistent with the provisions of this Title, other than any restriction on the regulatory powers vested in the Board by this Title, as the Board may deem necessary or desirable for the issue, payment, security, protection or marketing of the bonds, including without limitation covenants and other provisions as to the rates or amounts of fees, rents and other charges to be charged or made for use of the facilities; the use, pledge, custody,

securing, application and disposition of such revenues, of the proceeds of the bonds, and of any other moneys or contracts of the Authority; the operation, maintenance, repair and reconstruction of the facilities and the amounts which may be expended therefor; the sale, lease or other disposition of the facilities; the insuring of the facilities and of the revenues derived therefrom; the construction or other acquisition of other facilities; the issuance of additional bonds or other indebtedness; the rights of the bondholders and of any trustee for the bondholders upon default by the Authority or otherwise; and the modification of the provisions of the indenture and of the bonds. Reference on the face of the bonds to such resolution or indenture by its date of adoption or the apparent date on the face thereof is sufficient to incorporate all of the provisions thereof and of this Title into the body of the bonds and their appurtenant coupons. Each taker and subsequent holder of the bonds or coupons, whether the coupons are attached to or detached from the bonds, has recourse to all of the provisions of the indenture and of this Title and is bound thereby.

"Maximum Maturity

"33. No bond or its terms shall mature in more than fifty years from its own date and in the event any authorized issue is divided into two or more series or divisions, the maximum maturity date herein authorized shall be calculated from the date on the face of each bond separately, irrespective of the fact that different dates may be prescribed for the bonds of each separate series or division of any authorized issue.

"Tax Exemption

"34. All bonds and all other evidences of debt issued by the Authority under the provisions of this Title and the interest thereon shall at all times be free and ex-

empt from all taxation by or under authority of any signatory parties, except for transfer, inheritance and estate taxes.

"Interest

"35. Bonds shall bear interest at a rate of not to exceed six percent per annum, payable annually or semi-annually.

"Place of Payment

"36. The Board may provide for the payment of the principal and interest of bonds at any place or places within or without the signatory states, and in any specified lawful coin or currency of the United States of America.

"Execution

"37. The Board may provide for the execution and authentication of bonds by the manual, lithographed or printed facsimile signature of members of the Board, and by additional authentication by a trustee or fiscal agent appointed by the Board; provided, however, that one of such signatures shall be manual. If any of the members whose signatures or countersignatures appear upon the bonds or coupons cease to be members before the delivery of the bonds or coupons, their signatures or countersignatures are nevertheless valid and of the same force and effect as if the members had remained in office until the delivery of the bonds and coupons.

"Holding Own Bonds

"38. The Board shall have power out of any funds available therefor to purchase its bonds and may hold, cancel or resell such bonds.

"Sale

"39. The Board may fix terms and conditions for the sale or other disposition of any authorized issue of bonds.

The Board may sell bonds at less than their par or face value but no issue of bonds may be sold at an aggregate price below the par or face value thereof if such sale would result in a net interest cost to the Authority calculated upon the entire issue so sold of more than six percent per annum payable semiannually, according to standard tables of bond values. All bonds issued and sold pursuant to this Title may be sold in such manner, either at public or private sale, as the Board shall determine.

"Negotiability

"40. All bonds issued under the provisions of this Title are negotiable instruments.

"Bonds Eligible for Investment and Deposit

"41. Bonds issued under the provisions of this Title are hereby made securities in which all public officers and public agencies of the signatories and their political subdivisions and all banks, trust companies, savings and loan associations, investment companies and others carrying on a banking business, all insurance companies and insurance associations and others carrying on an insurance business, all administrators, executors, guardians, trustees and other fiduciaries, and all other persons may legally and properly invest funds, including capital in their control or belonging to them. Such bonds are hereby made securities which may properly and legally be deposited with and received by any officer of any signatory, or of any agency or political subdivision of any signatory, for any purpose for which the deposit of bonds or other obligations of such signatory is now or may hereafter be authorized by law.

"Validation Proceedings

"42. Prior to the issuance of any bonds, the Board may institute a special proceeding to determine the

legality of proceedings to issue the bonds and their validity under the laws of any of the signatory parties. Such proceeding shall be instituted and prosecuted in rem and the final judgment rendered therein shall be conclusive against all persons whomsoever and against each of the signatory parties.

"Recording

"43. No indenture need be recorded or filed in any public office, other than the office of the Board. The pledge of revenues provided in any indenture shall take effect forthwith as provided therein and irrespective of the date of receipt of such revenues by the Board of the indenture trustee. Such pledge shall be effective as provided in the indenture without physical delivery of the revenues to the Board or to the indenture trustee.

"Pledged Revenues

"44. Bond redemption and interest payments shall, to the extent provided in the resolution or indenture, constitute a first, direct and exclusive charge and lien on all revenues received from the use and operation of the facility, and on any sinking or other funds created therefrom. All such revenues, together with interest thereon, shall constitute a trust fund for the security and payment of such bonds and except as and to the extent provided in the indenture with respect to the payment therefrom of expenses for other purposes including administration, operation, maintenance, improvements or extensions of the facilities or other purposes shall not be used or pledged for any other purpose so long as such bonds, or any of them, are outstanding and unpaid.

"Remedies

"45. The holder of any bond may for the equal benefit and protection of all holders of bonds similarly situated: (1) by mandamus or other appropriate proceedings re-

quire and compel the performance of any of the duties imposed upon the Board or assumed by it, its officers, agents or employees under the provisions of any indenture, in connection with the acquisition, construction, operation, maintenance, repair, reconstruction or insurance of the facilities, or in connection with the collection, deposit, investment, application and disbursement of the revenues derived from the operation and use of the facilities, or in connection with the deposit, investment and disbursement of the proceeds received from the sale of bonds; or (2) by action or suit in a court of competent jurisdiction of any signatory party require the Authority to account as if it were the trustee of an express trust, or enjoin any acts or things which may be unlawful or in violation of the rights of the holders of the bonds. The enumeration of such rights and remedies does not, however, exclude the exercise or prosecution of any other rights or remedies available to the holders of bonds.

"ARTICLE X

"EQUIPMENT TRUST CERTIFICATES

"Power

"46. The Board shall have power to execute agreements, leases and equipment trust certificates with respect to the purchase of facilities or equipment such as cars, trolley buses and motor buses, or other craft, in the form customarily used in such cases and appropriate to effect such purchase, and may dispose of such equipment trust certificates in such manner as it may determine to be for the best interests of the Authority. Each vehicle covered by an equipment trust certificate shall have the name of the owner or lessor plainly marked upon both sides thereof, followed by the words 'Owner and Lessor'.

"Payments

"47. All monies required to be paid by the Authority under the provisions of such agreements, leases and equipment trust certificates shall be payable solely from the revenue to be derived from the operation of the transit system or from such grants, loans, appropriations or other revenues, as may be available to the Board under the provisions of this Title. Payment for such facilities or equipment, or rentals thereof, may be made in installments, and the deferred installments may be evidenced by equipment trust certificates as aforesaid, and title to such facilities or equipment may not vest in the Authority until the equipment trust certificates are paid.

"Procedure

"48. The agreement to purchase facilities or equipment by the Board may direct the vendor to sell and assign the equipment to a bank or trust company, duly authorized to transact business in any of the signatory States, or to the Housing and Home Finance Administrator, as trustee, lessor or vendor, for the benefit and security of the equipment trust certificates and may direct the trustee to deliver the facilities and equipment to one or more designated officers of the Board and may authorize the trustee simultaneously therewith to execute and deliver a lease of the facilities or equipment to the Board.

"Agreements and Leases

"49. The agreements and leases shall be duly acknowledged before some person authorized by law to take acknowledgements of deeds and in the form required for acknowledgement of deeds and such agreements, leases, and equipment trust certificates shall be authorized by resolution of the Board and shall contain such covenants, conditions and provisions as may be deemed necessary or appropriate to insure the payment of the equipment trust

certificates from the revenues to be derived from the operation of the transit system and other funds.

"The covenants, conditions and provisions of the agreements, leases and equipment trust certificates shall not conflict with any of the provisions of any resolution or trust agreement securing the payment of bonds or other obligations of the Authority then outstanding or conflict with or be in derogation of the rights of the holders of any such bonds or other obligations.

"Law Governing

"50. The equipment trust certificates issued hereunder shall be governed by Laws of the District of Columbia and for this purpose the chief place of business of the Authority shall be considered to be the District of Columbia. The filing of any documents required or permitted to be filed shall be governed by the Laws of the District of Columbia.

"ARTICLE XI

"OPERATION OF FACILITIES

"Operation by Contract or Lease

"51. The Authority shall not perform transit service, nor any of the functions, such as maintenance of equipment and right of way normally associated with the providing of such service, with any transit facilities owned or controlled by it but shall provide for the performance of transit service with such facilities by contract or contracts with private transit companies, private railroads, or other persons. Any facilities and properties owned or controlled by the Authority, other than those utilized in performing transit service, may be operated by the Authority or by others pursuant to contract or lease as the Board may determine. All operations of such facilities and properties by the Authority and by its Contractor and lessees shall be within the Zone.

"The Operating Contract

"52. Without limitation upon the right of the Board to prescribe such additional terms and provisions as it may deem necessary and appropriate, the operating contract shall;

"(a) specify the services and functions to be performed by the Contractor;

"(b) provide that the Contractor shall hire, supervise and control all personnel required to perform the services and functions assumed by it under the operating contract and that all such personnel shall be employees of the Contractor and not of the Authority;

"(c) require the Contractor to assume the obligations of the labor contract or contracts of any transit company which may be acquired by the Authority and assume the pension obligations of any such transit company;

"(d) require the Contractor to comply in all respects with the labor policy set forth in Article XIV of this Title;

"(e) provide that no transfer of ownership of the capital stock, securities or interests in any Contractor, whose principal business is the operating contract, shall be made without written approval of the Board and the certificates or other instruments representing such stock, securities or interests shall contain a statement of this restriction;

"(f) provide that the Board shall have the sole authority to determine the rates or fares to be charged, the routes to be operated and the service to be furnished;

"(g) specify the obligations and liabilities which are to be assumed by the Contractor and those which are to be the responsibility of the Authority;

"(h) provide for an annual audit of the books and accounts of the Contractor by an independent certified public accountant to be selected by the Board and for such other audits, examinations and investigations of the books and records, procedures and affairs of the Contractor at such times and in such manner as the Board shall require, the cost of such audits, examinations and investigations to be borne as agreed by the parties in the operating contract; and

"(i) provide that no operating contract shall be entered into for a term in excess of five years; provided, that any such contract may be renewed for successive terms, each of which shall not exceed five years. Any such operating contract shall be subject to termination by the Board for cause only.

"Compensation for Contractor

"53. Compensation to the Contractor under the operating contract may, in the discretion of the Board, be in the form of (1) a fee paid by the Board to the Contractor for services, (2) a payment by the Contractor to the Board for the right to operate the system, or (3) such other arrangement as the Board may prescribe; provided, however, that the compensation shall bear a reasonable relationship to the benefits to the Authority and to the estimated costs the Authority would incur in directly performing the functions and duties delegated under the operating contract; and provided, further, that no such contract shall create any right in the Contractor (1) to make or change any rate or fare or alter or change the service specified in the contract to be provided or (2) to seek judicial relief by any form of original action, review or other proceedings from any rate or fare or service prescribed by the Board. Any assertion, or attempted assertion, by the Contractor of the right to make or change any rate or fare or service prescribed by the

Board shall constitute cause for termination of the operating contract. The operating contract may provide incentives for efficient and economical management.

"Selection of Contractor

"54. The Board shall enter into an operating contract only after formal advertisement and negotiations with all interested and qualified parties, including private transit companies rendering transit service within the Zone; provided, however, that, if the Authority acquires transit facilities from any agency of the federal or District of Columbia governments, in accordance with the provisions of Article VII, Section 20 of this Title, the Authority shall assume the obligations of any operating contract which the transferor agency may have entered into.

"ARTICLE XII

"COORDINATION OF PRIVATE AND PUBLIC FACILITIES

"Declaration of Policy

"55. It is hereby declared that the interest of the public in efficient and economical transit service and in the financial well-being of the Authority and of the private transit companies requires that the public and private segments of the regional transit system be operated, to the fullest extent possible, as a coordinated system without unnecessary duplicating service.

"Implementation of Policy

"56. In order to carry out the legislative policy set forth in Section 55 of this Article XII

"(a) The Authority—

"(1) except as herein provided, shall not, directly or through a Contractor, perform transit service by bus or similar motor vehicles;

"(2) shall, in cooperation with the private carriers and WMATC, coordinate to the fullest extent practicable, the schedules for service performed by its facilities with the schedules for service performed by private carriers; and

"(3) shall enter into agreements with the private carriers to establish and maintain, subject to approval by WMATC, through routes and joint fares and provide for the division thereof, or, in the absence of such agreements, establish and maintain through routes and joint fares in accordance with orders issued by WMATC directed to the private carriers when the terms and conditions for such through service and joint fares are acceptable to it.

"(b) The WMATC, upon application, complaint, or upon its own motion, shall—

"(1) direct private carriers to coordinate their schedules for service with the schedules for service performed by facilities owned or controlled by the Authority;

"(2) direct private carriers to improve or extend any existing services or provide additional service over additional routes;

"(3) authorize a private carrier, pursuant to agreement between said carrier and the Authority, to establish and maintain through routes and joint fares for transportation to be rendered with facilities owned or controlled by the Authority if, after hearing held upon reasonable notice, WMATC finds that such through routes and joint fares are required by the public interest; and

"(4) in the absence of such an agreement with the Authority, direct a private carrier to establish and maintain through routes and joint fares with the

Authority, if, after hearing held upon reasonable notice, WMATC finds that such through service and joint fares are required by the public interest; provided, however, that no such order, rule or regulation of WMATC shall be construed to require the Authority to establish and maintain any through route and joint fare.

"(c) WMATC shall not authorize or require a private carrier to render any service, including the establishment or continuation of a joint fare for a through route service with the Authority which is based on a division thereof between the Authority and private carrier which does not provide a reasonable return to the private carrier, unless the carrier is currently earning a reasonable return on its operation as a whole in performing transportation subject to the jurisdiction of WMATC. In determining the issue of reasonable return, WMATC shall take into account any income attributable to the carrier, or to any corporation, firm or association owned in whole or in part by the carrier, from the Authority whether by way of payment for services or otherwise.

"(d) If the WMATC is unable, through the exercise of its regulatory powers over the private carriers granted in paragraph (b) hereof or otherwise, to bring about the requisite coordination of operations and service between the private carriers and the Authority, the Authority may in the situations specified in paragraph (b) hereof, cause such transit service to be rendered by its Contractor by bus or other motor vehicle, as it shall deem necessary to effectuate the policy set forth in Section 55 hereof. In any such situation, the Authority, in order to encourage private carriers to render bus service to the fullest extent practicable, may, pursuant to agreement, make reasonable subsidy payments to any private carrier.

"Rights of Private Carriers Unaffected

"57. Nothing in this Title shall restrict or limit such rights and remedies, if any, that any private carrier may have against the Authority arising out of acts done or actions taken by the Authority hereunder. In the event any court of competent jurisdiction shall determine that the Authority has unlawfully infringed any rights of any private carrier or otherwise caused or permitted any private carrier to suffer legally cognizable injury, damages or harm and shall award a judgment therefor, such judgment shall constitute a lien against any and all of the assets and properties of the Authority.

"Financial Assistance to Private Carriers

"58. (a) The Board may accept grants from and enter into loan agreements with the Housing and Home Finance Administrator, pursuant to the provisions of the Urban Mass Transportation Act of 1964 (78 Stat. 302), or with any successor agency or under any law of similar purport, for the purpose of rendering financial assistance to private carriers.

"(b) An application by the Board for any such grant or loan shall be based on and supported by a report from WMATC setting forth for each private carrier to be assisted (1) the equipment and facilities to be acquired, constructed, reconstructed, or improved, (2) the service proposed to be rendered by such equipment and facilities, (3) the improvement in service expected from such facilities and equipment, (4) how the use of such facilities and equipment will be coordinated with the transit facilities owned by the Authority, (5) the ability of the affected private carrier to repay any such loans or grants and (6) recommend terms for any such loans or grants.

"(c) Any equipment or facilities acquired, constructed, reconstructed or improved with the proceeds of such

grants or loans shall be owned by the Authority and may be made available to private carriers only by lease or other agreement which contain provisions acceptable to the Housing and Home Finance Administrator assuring that the Authority will have satisfactory continuing control over the use of such facilities and equipment.

"ARTICLE XIII

"JURISDICTION; RATES AND SERVICE

"Washington Metropolitan Area Transit Commission

"59. Except as provided herein, this Title shall not affect the functions and jurisdiction of WMATC, as granted by Titles I and II of this Compact, over the transportation therein specified and the persons engaged therein and the Authority shall have no jurisdiction with respect thereto.

"Public Facilities

"60. Service performed by transit facilities owned or controlled by the Authority, and the rates and fares to be charged for such service, shall be subject to the sole and exclusive jurisdiction of the Board and, notwithstanding any other provision in this Compact contained, WMATC shall have no authority with respect thereto, or with respect to any contractor in connection with the operation by it of transit facilities owned or controlled by the Authority. The determinations of the Board with respect to such matters shall not be subject to judicial review nor to the processes of any court.

"Standards

"61. Insofar as practicable, and consistent with the provision of adequate service at reasonable fares, the rates and fares and service shall be fixed by the Board so as to result in revenues which will:

"(a) pay the operating expenses and provide for repairs, maintenance and depreciation of the transit system owned or controlled by the Authority;

"(b) provide for payment of all principal and interest on outstanding revenue bonds and other obligations and for payment of all amounts to sinking funds and other funds as may be required by the terms of any indenture or loan agreement;

"(c) provide for the purchase, lease or acquisition of rolling stock, including provisions for interest, sinking funds, reserve funds, or other funds required for payment of any obligations incurred by the Authority for the acquisition of rolling stock; and

"(d) provide funds for any purpose the Board deems necessary and desirable to carry out the purposes of this Title.

"Hearings

"62. (a) The Board shall not make or change any fare or rate, nor establish or abandon any service except after holding a public hearing with respect thereto.

"(b) Any signatory, any political subdivision thereof, any agency of the federal government and any person, firm or association served by or using the transit facilities of the Authority and any private carrier may file a request with the Board for a hearing with respect to any rates or charges made by the Board or any service rendered with the facilities owned or controlled by the Authority. Such request shall be in writing, shall state the matter on which a hearing is requested and shall set forth clearly the matters and things on which the request relies. As promptly as possible after such a request is filed, the Board, or such officer or employee as it may designate, shall confer with the protestant with respect to the matters complained of. After such conference, the Board, if it deems the matter meritorious

and of general significance, may call a hearing with respect to such request.

"(c) The Board shall give at least thirty days' notice for all hearings. The notice shall be given by publication in a newspaper of daily circulation throughout the Zone and such notice shall be published once a week for two successive weeks. The notice shall start with the day of first publication. In addition, the Board shall post notices of the hearing in its offices, all stations and terminals, and in all of its vehicles and rolling stock in revenue service.

"(d) Prior to calling a hearing on any matter specified in this section, the Board shall prepare and file at its main office and keep open for public inspection its report relating to the proposed action to be considered at such hearing. Upon receipt by the Board of any report submitted by WMATC, in connection with a matter set for hearing, pursuant to the provisions of Section 63 of this Article XIII, the Board shall file such report at its main office and make it available for public inspection. For hearings called by the Board pursuant to paragraph (b), above, the Board also shall cause to be lodged and kept open for public inspection the written request upon which the hearing is granted and all documents filed in support thereof.

"Reference of Matters to WMATC

"63. To facilitate the attainment of the public policy objectives for operation of the publicly and privately owned or controlled transit facilities as stated in Article XII, Section 55, prior to the hearings provided for by Section 62 hereof—

"(a) The Board shall refer to WMATC for its consideration and recommendations, any matter which the Board considers may affect the operation of the publicly

and privately owned or controlled transit facilities as a coordinated regional transit system and any matter for which the Board has called a hearing, pursuant to Section 62 of this Article XIII, except that temporary or emergency changes in matters affecting service shall not be referred; and

"(b) WMATC, upon such reference of any matter to it, shall give the referred matter preference over any other matters pending before it and shall, as expeditiously as practicable, prepare and transmit its report thereon to the Board. The Board may request WMATC to reconsider any part of its report or to make any supplemental reports it deems necessary. All of such reports shall be advisory only.

"(c) Any report submitted by WMATC to the Board shall consider, without limitation, the probable effect of the matter or proposal upon the operation of the publicly and privately owned or controlled transit facilities as a coordinated regional system, passenger movements, fare structures, service and the impact on the revenues of both the public and private facilities.

"ARTICLE XIV

"LABOR POLICY

"Construction

"64. The Board shall take such action as may be necessary to insure that all laborers and mechanics employed by contractors or subcontractors in the construction, alteration or repair, including painting and decorating, of projects, buildings and works which are undertaken by the Authority or are financially assisted by it, shall be paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act, as amended (40 U.S.C. 276a—267a-5), and

every such employee shall receive compensation at a rate not less than one and one-half times his basic rate of pay for all hours worked in any workweek in excess of eight hours in any workday or forty hours in any workweek, as the case may be. A provision stating the minimum wages thus determined and the requirement that overtime be paid as above provided shall be set out in each project advertisement for bids and in each bid proposal form and shall be made a part of the contract covering the project, which contract shall be deemed to be a contract of the character specified in Section 103 of the Contract Work Hours Standards Act (76 Stat. 357), as now or as may hereafter be in effect. The Secretary of Labor shall have, with respect to the administration and enforcement of the labor standards specified in this provision, the supervisory, investigatory and other authority and functions set forth in Reorganization Plan Number 14 of 1950 (15 F.R. 3176, 64 Stat. 1267, 5 U.S.C. 133z-15), and section 2 of the Act of June 13, 1934, as amended (48 Stat. 948, as amended; 40 U.S.C. 276(c)). The requirements of this section shall also be applicable with respect to the employment of laborers and mechanics in the construction, alteration or repair, including painting and decorating, of the transit facilities owned or controlled by the Authority where such activities are performed by a Contractor pursuant to agreement with the operator of such facilities.

"Equipment and Supplies

"65. Contracts for the manufacture or furnishing of materials, supplies, articles and equipment shall be subject to the provisions of the Walsh-Healey Public Contracts Act (41 U.S.C. 35 et seq.), as now or as may hereafter be in effect.

"Operations

"66. It shall be a condition of the operation of the transit facilities owned or controlled by the Authority that

the provisions of section 10(c) of the Urban Mass Transportation Act of 1964 (49 U.S.C. 1609(c)) shall be applicable to any contract or other arrangement for the operation of such facilities.

"ARTICLE XV

"RELOCATION ASSISTANCE

"Relocation Program and Payments

"67. Section 7 of the Urban Mass Transportation Act of 1964, and as the same may from time to time be amended, and all regulations promulgated thereunder, are hereby made applicable to individuals, families, business concerns and nonprofit organizations displaced from real property by actions of the Authority without regard to whether financial assistance is sought by or extended to the Authority under any provision of that Act; provided, however, that in the event real property is acquired for the Authority by an agency of the federal government, or by a State or local agency or instrumentality, the Authority is authorized to reimburse the acquiring agency for relocation payments made by it.

"Relocation of Public or Public Utility Facilities

"68. Notwithstanding the provisions of Section 67 of this article XV, any highway or other public facility or any facilities of a public utility company which will be dislocated by reason of a project deemed necessary by the Board to effectuate the authorized purposes of this Title shall be relocated if such facilities are devoted to a public use, and the reasonable cost of relocation, if substitute facilities are necessary, shall be paid by the Board from any of its monies.

"ARTICLE XVI

"GENERAL PROVISIONS

"Creation and Administration of Funds

"69. (a) The Board may provide for the creation and administration of such funds as may be required. The funds shall be disbursed in accordance with rules established by the Board and all payments from any fund shall be reported to the Board. Monies in such funds and other monies of the Authority shall be deposited, as directed by the Board, in any state or national bank located in the Zone having a total paid-in capital of at least one million dollars ($1,000,000). The trust department of any such state or national bank may be designated as a depositary to receive any securities acquired or owned by the Authority. The restriction with respect to paid-in capital may be waived for any such bank which agrees to pledge federal securities to protect the funds and securities of the Authority in such amounts and pursuant to such arrangements as may be acceptable to the Board.

"(b) Any monies of the Authority may, in the discretion of the Board and subject to any agreement or covenant between the Authority and the holders of any of its obligations limiting or restricting classes of investments, be invested in bonds or other obligations of, or guaranteed as to interest and principal by, the United States, Maryland, Virginia or the political subdivisions or agencies thereof.

"Annual Independent Audit

"70. (a) As soon as practical after the closing of the fiscal year, an audit shall be made of the financial accounts of the Authority. The audit shall be made by qualified certified public accountants selected by the Board, who shall have no personal interest direct or indirect in the financial affairs of the Authority or any

of its officers or employees. The report of audit shall be prepared in accordance with generally accepted auditing principles and shall be filed with the Chairman and other officers as the Board shall direct. Copies of the report shall be distributed to each Director, to the Congress, to the Board of Commissioners of the District of Columbia, to the Governors of Virginia and Maryland, to the Washington Suburban Transit Commission, to the Northern Virginia Transportation Commission and to the governing bodies of the political subdivisions located within the Zone which are parties to commitments for participation in the financing of the Authority and shall be made available for public distribution.

"(b) The financial transactions of the Board shall be subject to audit by the United States General Accounting Office in accordance with the principles and procedures applicable to commercial corporate transactions and under such rules and regulations as may be prescribed by the Comptroller General of the United States. The audit shall be conducted at the place or places where the accounts of the Board are kept.

"(c) Any Director, officer or employee who shall refuse to give all required assistance and information to the accountants selected by the Board or who shall refuse to submit to them for examination such books, documents, records, files, accounts, papers, things or property as may be requested shall, in the discretion of the Board forfeit his office.

"Reports

"71. The Board shall make and publish an annual report on its programs, operations and finances, which shall be distributed in the same manner provided by Section 70 of this Article XVI for the report of annual audit. It may also prepare, publish and distribute such other public reports and informational materials as it may deem necessary or desirable.

"Insurance

"72. The Board may self-insure or purchase insurance and pay the premiums therefore against loss or damage to any of its properties; against liability for injury to persons or property; and against loss of revenue from any cause whatsoever. Such insurance coverage shall be in such form and amount as the Board may determine, subject to the requirements of any agreement arising out of issuance of bonds or other obligations by the Authority.

"Purchasing

"73. Contracts for the construction, reconstruction or improvement of any facility when the expenditure required exceeds ten thousand dollars ($10,000) and contracts for the purchase of supplies, equipment and materials when the expenditure required exceeds two thousand five hundred dollars ($2,500) shall be advertised and let upon sealed bids to the lowest responsible bidder. Notice requesting such bids shall be published in a manner reasonably likely to attract prospective bidders, which publication shall be made at least ten days before bids are received and in at least two newspapers of general circulation in the Zone. The Board may reject any and all bids and readvertise in its discretion. If after rejecting bids the Board determines and resolves that, in its opinion, the supplies, equipment and materials may be purchased at a lower price in the open market, the Board may give each responsible bidder an opportunity to negotiate a price and may proceed to purchase the supplies, equipment and materials in the open market at a negotiated price which is lower than the lowest rejected bid of a responsible bidder, without further observance of the provisions requiring bids or notice. The Board shall adopt rules and regulations to provide for purchasing from the lowest responsible bidder when sealed bids, notice and publication are not required by this section.

The Board may suspend and waive the provisions of this section requiring competitive bids whenever:

"(a) the purchase is to be made from or the contract is to be made with the federal or any State government or any agency or political subdivision thereof or pursuant to any open end bulk purchase contract of any of them;

"(b) the public exigency requires the immediate delivery of the articles;

"(c) only one source of supply is available; or

"(d) the equipment to be purchased is of a technical nature and the procurement thereof without advertising is necessary in order to assure standardization of equipment and interchangeability of parts in the public interest.

"Rights of Way

"74. The Board is authorized to locate, construct and maintain any of its transit and related facilities in, upon, over, under or across any streets, highways, freeways, bridges and any other vehicular facilities, subject to the applicable laws governing such use of such facilities by public agencies. In the absence of such laws, such use of such facilities by the Board shall be subject to such reasonable conditions as the highway department or other affected agency of a signatory party may require; provided, however, that the Board shall not construct or operate transit or related facilities upon, over, or across any parkways or park lands without the consent of, and except upon the terms and conditions required by, the agency having jurisdiction with respect to such parkways and park lands, but may construct or operate such facilities in a subway under such parkways or park lands upon such reasonable terms and conditions as may be specified by the agency having jurisdiction with respect thereto.

"Compliance with Laws, Regulations and Ordinances

"75. The Board shall comply with all laws, ordinances and regulations of the signatories and political subdivisions and agencies thereof with respect to use of streets, highways and all other vehicular facilities, traffic control and regulation, zoning, signs and buildings.

"Police

"76. The Board is authorized to employ watchmen, guards and investigators as it may deem necessary for the protection of its properties, personnel and passengers and such employees, when authorized by any jurisdiction within the Zone, may serve as special police officers in any such jurisdiction. Nothing contained herein shall relieve any signatory or political subdivision or agency thereof from its duty to provide police service and protection or to limit, restrict or interfere with the jurisdiction of or performance of duties by the existing police and law enforcement agencies.

"Exemption from Regulation

"77. Except as otherwise provided in this Title, any transit service rendered by transit facilities owned or controlled by the Authority and the Authority or any corporation, firm or association performing such transit service pursuant to an operating contract with the Authority, shall, in connection with the performance of such service, be exempt from all laws, rules, regulations and orders of the signatories and of the United States otherwise applicable to such transit service and persons, except that laws, rules, regulations and orders relating to inspection of equipment and facilities, safety and testing shall remain in force and effect; provided, however, that the Board may promulgate regulations for the safety of the public and employees not inconsistent with the applicable laws, rules, regulations or orders of the signatories and of the United States.

"Tax Exemption

"78. It is hereby declared that the creation of the Authority and the carrying out of the corporate purposes of the Authority is in all respects for the benefit of the people of the signatory states and is for a public purpose and that the Authority and the Board will be performing an essential governmental function, including, without limitation, proprietary, governmental and other functions, in the exercise of the powers conferred by this Title. Accordingly, the Authority and the Board shall not be required to pay taxes or assessments upon any of the property acquired by it or under its jurisdiction, control, possession or supervision or upon its activities in the operation and maintenance of any transit facilities or upon any revenues therefrom and the property and income derived therefrom shall be exempt from all federal, State, District of Columbia, municipal and local taxation. This exemption shall include, without limitation, all motor vehicle license fees, sales taxes and motor fuel taxes.

"Free Transportation and School Fares

"79. All laws of the signatories with respect to free transportation and school fares shall be applicable to transit service rendered by facilities owned or controlled by the Authority.

"Liability for Contracts and Torts

"80. The Authority shall be liable for its contracts and for its torts and those of its Directors, officers, employees and agent committed in the conduct of any proprietary function, in accordance with the law of the applicable signatory (including rules on conflict of laws), but shall not be liable for any torts occurring in the performance of a governmental function. The exclusive remedy for such breach of contracts and torts for which the Authority shall be liable, as herein provided, shall be

by suit against the Authority. Nothing contained in this Title shall be construed as a waiver by the District of Columbia, Maryland, Virginia and the counties and cities within the Zone of any immunity from suit.

"Jurisdiction of Courts

"81. The United States District Courts shall have original jurisdiction, concurrent with the Courts of Maryland and Virginia, of all actions brought by or against the Authority and to enforce subpoenas issued under this Title. Any such action initiated in a State Court shall be removable to the appropriate United States District Court in the manner provided by Act of June 25, 1948, as amended (28 U.S.C. 1446).

"Condemnation

"82. (a) The Authority shall have the power to acquire by condemnation, whenever in its opinion it is necessary or advantageous to the Authority to do so, any real or personal property, or any interest therein, necessary or useful for the transit system authorized herein, except property owned by the United States, by a signatory, or any political subdivision thereof, or by a private transit company.

"(b) Proceedings for the condemnation of property in the District of Columbia shall be instituted and maintained under the Act of December 23, 1963 (77 Stat. 577-581, D. C. Code 1961, Supp. IV, Sections 1351-1368). Proceedings for the condemnation of property located elsewhere within the Zone shall be instituted and maintained, if applicable, pursuant to the provisions of the Act of August 1, 1888, as amended (25 Stat. 357, 40 U.S.C. 257) and the Act of June 25, 1948 (62 Stat. 935 and 937, 28 U.S.C. 1358 and 1403) or any other applicable Act; provided, however, that if there is no applicable Federal law, condemnation proceedings shall be in accordance with the

provisions of the State law of the signatory in which the property is located governing condemnation by the highway agency of such state. Whenever the words 'real property,' 'realty,' 'land,' 'easement,' 'right-of-way,' or words of similar meaning are used in any applicable federal or state law relating to procedure, jurisdiction and venue, they shall be deemed, for the purposes of this Title, to include any personal property authorized to be acquired hereunder.

"(c) Any award or compensation for the taking of property pursuant to this Title shall be paid by the Authority, and none of the signatory parties nor any other agency, instrumentality or political subdivision thereof shall be liable for such award or compensation.

"Enlargement and Withdrawal; Duration

"83. (a) When advised in writing by the Northern Virginia Transportation Commission or the Washington Suburban Transit Commission that the geographical area embraced therein has been enlarged, the Board, upon such terms and conditions as it may deem appropriate, shall by resolution enlarge the Zone to embrace the additional area.

"(b) The duration of this Title shall be perpetual but any signatory thereto may withdraw therefrom upon two years' written notice to the Board.

"(c) The withdrawal of any signatory shall not relieve such signatory, any transportation district, county or city or other political subdivision thereof from any obligation to the Authority, or inuring to the benefit of the Authority, created by contract or otherwise.

"Amendments and Supplements

"84. Amendments and supplements to this Title to implement the purposes thereof may be adopted by legislative action of any of the signatory parties concurred in by all of the others.

"Construction and Severability

"85. The provisions of this Title and of the agreements thereunder shall be severable and if any phrase, clause, sentence or provision of this Title or any such agreement is declared to be unconstitutional or the applicability thereof to any signatory party, political subdivision or agency thereof is held invalid, the constitutionality of the remainder of this Title or any such agreement and the applicability thereof to any other signatory party, political subdivision or agency thereof or circumstance shall not be affected thereby. It is the legislative intent that the provisions of this Title be reasonably and liberally construed.

"Effective Date; Execution

"86. This Title shall be adopted by the signatories in the manner provided by law therefor and shall be signed and sealed in four duplicate original copies. One such copy shall be filed with the Secretary of State of each of the signatory parties or in accordance with laws of the State in which the filing is made, and one copy shall be filed and retained in the archives of the Authority upon its organization. This Title shall become effective ninety days after the enactment of concurring legislation by or on behalf of the District of Columbia, Maryland and Virginia and consent thereto by the Congress and all other acts or actions have been taken, including the signing and execution of the Title by the Governors of Maryland and Virginia and the Commissioners of the District of Columbia."

Section 2. The Commissioners of the District of Columbia are authorized and directed to enter into and execute an amendment to the Compact substantially as

set forth above with the States of Virginia and Maryland and are further authorized and directed to carry out and effectuate the terms and provisions of said Title III, and there are hereby authorized to be appropriated out of District of Columbia funds such amounts as are necessary to carry out the obligations of the District of Columbia in accordance with the terms of the said Title III.

Section 3. (a) To assure uninterrupted progress in the development of the facilities authorized by the National Capital Transportation Act of 1965, the transfer of the functions and duties of the National Capital Transportation Agency (herein referred to as the Agency) to the Washington Metropolitan Area Transit Authority (herein referred to as the Authority) as required by Section 301(b) of the National Capital Transportation Act of 1960 shall take place on September 30, 1967.

(b) Upon the effective date of the transfer of functions and duties authorized by subsection (a) of this section, the President is authorized to transfer to the Authority such real and personal property, studies, reports, records, and other assets and liabilities as are appropriate in order that the Authority may assume the functions and duties of the Agency and, further, the President shall make provision for the transfer to the Authority of the unexpended balance of the appropriations, and of other funds, of the Agency for use by the Authority but such unexpended balances so transferred shall be used only for the purpose for which such appropriations were originally made. Subsequent to said effective date, there is authorized to be appropriated to the Department of Housing and Urban Development, for payment to the Authority, any unappropriated portion of the authorization specified in Section 5(a)(1) of the National Capital Transportation Act of 1965. There is also authorized to be appropriated to the District of

Columbia out of the general fund of the District of Columbia, for payment to the Authority, any unappropriated portion of the authorization specified in section 5(a)(2) of such Act. Any such appropriations shall be used only for the purposes for which such authorizations were originally made.

(c) Pending the assumption by the Authority of the functions and duties of the Agency, the Agency is authorized and directed, in the manner herein set forth, fully to cooperate with and assist the Authority, the Northern Virginia Transportation Commission and the Washington Suburban Transit Commission in the development of plans for the extensions, new lines and related facilities required to expand the basic system authorized by the National Capital Transportation Act of 1965 into a regional system, but, pending such transfer of functions and duties, nothing in this Act shall be construed to impair the performance by the Agency of the functions and duties imposed by the National Capital Transportation Act of 1965.

(d) In order to provide the cooperation and assistance specified in subsection (c) of this section, the Agency is authorized to perform, on a reimbursable basis, planning, engineering and such other services for the Authority, as the Authority may request, or to obtain such services by contract, but all such assistance and services shall be rendered in accordance with policy determinations made by the Authority and shall be advisory only.

(e) Amounts received by the Agency from the Authority as provided in subsection (d) of this section shall be available for expenditure by the Agency in performing services for the Authority.

Section 4. The United States District Courts shall have original jurisdiction, concurrent with the Courts

of Maryland and Virginia, of all actions brought by or against the Authority and to enforce subpoenas issued pursuant to the provisions of Title III. Any such action initiated in a State court shall be removable to the appropriate United States District Court in the manner provided by the Act of June 25, 1948, as amended (28 U.S.C. 1446).

Section 5. (a) All laws or parts of laws of the United States and of the District of Columbia inconsistent with the provisions of Title III of this Act are hereby amended for the purpose of this Act to the extent necessary to eliminate such inconsistencies and to carry out the provisions of this Act and Title III and all laws or parts of laws and all reorganization plans of the United States are hereby amended and made applicable for the purpose of this Act to the extent necessary to carry out the provisions of this Act and Title III.

(b) Section 202 of the National Capital Transportation Act of 1960 (Public Law 86-669, 74 Stat. 537), as amended by Section 7 of the National Capital Transportation Act of 1965 (Public Law 89-173, 79 Stat. 666) is hereby repealed.

Section 6. (a) The right to alter, amend or repeal this Act is hereby expressly reserved.

(b) The Authority shall submit to Congress and the President copies of all annual and special reports made to the Governors, the Commissioners of the District of Columbia and/or the legislatures of the compacting States.

(c) The President and the Congress or any committee thereof shall have the right to require the disclosure and furnishing of such information by the Authority as they may deem appropriate. Further, the President and Congress or any of its committees shall have access

to all books, records and papers of the Authority as well as the right of inspection of any facility used, owned, leased, regulated or under the control of said Authority.

(d) In carrying out the audits provided for in section 70(b) of the Compact the representatives of the General Accounting Office shall have access to all books, accounts, financial records, reports, files, and all other papers, things, or property belonging to or in use by the Board and necessary to facilitate the audit, and they shall be afforded full facilities for verifying transactions with the balances or securities held by depositories, agents, and custodians.

Approved November 6, 1966.

NATIONAL CAPITAL TRANSPORTATION ACT OF 1969, AS AMENDED

Pub. L. 91-143, 83 Stat. 320 (1969);

Pub. L. 92-349, 86 Stat. 464 (1972);

Pub. L. 92-517, 86 Stat. 1004 (1972).

Public Law 91-143

AN ACT

To authorize a Federal contribution for the effectuation of a transit development program for the National Capital region, and to further the objectives of the National Capital Transportation Act of 1965 (79 Stat. 663) and Public Law 89-774 (80 Stat. 1324).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SECTION 1. That this Act may be cited as the "National Capital Transportation Act of 1969".

DEFINITIONS

SEC. 2. For the purposes of this Act—

(1) The term "Adopted Regional System" means that system described in the Transit Authority's report entitled "Adopted Regional Rapid Rail Transit Plan and Program, March 1, 1968 (revised February 7, 1969)", as that system may hereafter be altered, revised, or amended in accordance with the Compact.

(2) The term "Compact" means the Washington Metropolitan Area Transit Authority Compact (Public Law 89-774; 80 Stat. 1324).

(3) The term "Transit Authority" means the Washington Metropolitan Area Transit Authority established under article III of the Compact.

AUTHORIZATION OF FEDERAL CONTRIBUTIONS

SEC. 3. (a) To provide the Federal share of the cost of the Adopted Regional System, which system supersedes that heretofore authorized by the Congress in the National Capital Transportation Act of 1965 (Public Law 89-173; 79 Stat. 663), the Secretary of Transportation is authorized to make annual contributions to the Transit Authority in amounts sufficient to finance in part the cost of the Adopted Regional System; except that the aggregate amount of Federal contributions for the Adopted Regional System, including the $100,000,000 authorized to be appropriated by section 5(a)(1) of the National Capital Transportation Act of 1965, shall not exceed the lower amount of $1,147,044,000 or two-thirds of the net project cost of the Adopted Regional System.

(b) Federal contributions for the Adopted Regional System shall be subject to the following limitations and conditions:

(1) The work for which contributions are authorized shall be subject to the provisions of the Compact and shall be carried out substantially in accordance with the plans and schedules for the Adopted Regional System.

(2) The aggregate amount of such Federal contributions on or prior to the last day of any given fiscal year shall be matched by the local participating governments by payment of the local share of capital contributions required for the period ending with the last day of such year in a total amount not less than 50 per centum of the amount of such Federal contributions.

(c) There is authorized to be appropriated to the Secretary of Transportation, without fiscal year limitation, not to exceed $1,047,044,000 to carry out the purposes of this section. The appropriations authorized by this subsection shall be in addition to the appropriations authorized by section 5(a)(1) of the National Capital Transportation Act of 1965.

AUTHORIZATION OF DISTRICT OF COLUMBIA CONTRIBUTIONS

SEC. 4. (a) To provide the District of Columbia share of the cost of the Adopted Regional System, the Commissioner of the District of Columbia is authorized to contract with the Transit Authority to make annual capital contributions aggregating not to exceed $216,500,000. To carry out the purposes of this section there is authorized to be appropriated out of the general fund of the District of Columbia, without fiscal year limitations, not to exceed $166,500,000.

(b) The last sentence of paragraph (3) of subsection (b) of the first section of the Act of June 6, 1958 (D.C. Code, sec. 9-220(b)(3)), is amended by striking out "$50,000,000 of the principal amount of the loans authorized to be made to the Commissioners under this subsection shall be utilized to carry out the purposes of the National Capital Transportation Act of 1965 (D.C. Code, secs. 1-1404, 1-1421—1-1426; and" and inserting in lieu thereof "$216,500,000 of the principal amount of the loans authorized to be made to the Commissioner under this subsection shall be utilized to make the contributions authorized by section 4 of the National Capital Transportation Act of 1969. To such extent, not exceeding $166,500,000, as may be necessary for this purpose, the District of Columbia may exceed the limitation on aggregate indebtedness established pursuant to this subsection."

(c) The appropriations authorized by subsection (a) of this section shall be in addition to the appropriations authorized on behalf of the District of Columbia by section 5(a)(2) of the National Capital Transportation Act of 1965.

(d) The Commissioner of the District of Columbia is further authorized to contract with the Transit Authority and to pay in accordance with the terms thereof for the service to be provided to the District of Columbia by the Adopted Regional System.

CONSTRUCTION APPROVALS

SEC. 5. (a) No portion of the Adopted Regional System shall be constructed within the United States Capitol Grounds except upon approval of the Commission for Extension of the United States Capitol.

(b) Construction of the Adopted Regional System in, on, under or over public space in the District of Columbia under the jurisdiction of the Commissioner of the District of Columbia shall, in the interest of public convenience and safety, be performed in accordance with schedules agreed upon between the Transit Authority and the Commissioner, to the end that such construction work will be coordinated with other construction work in such public space; and the Commissioner shall so exercise his jurisdiction and control over such public space as to facilitate the Transit Authority's use and occupation thereof for construction of the Adopted Regional System.

REPAYMENT FROM EXCESS REVENUES

SEC. 6. To the extent that revenues or other receipts derived from or in connection with the ownership or operation of the Adopted Regional System (other than

service payments under transit service agreements executed between the Transit Authority and local political subdivisions, the proceeds of bonds or other evidences of indebtedness issued by the Transit Authority, and capital contributions received by the Transit Authority) are excess to the amounts necessary to make all payments, including debt service, operating and maintenance expenses, and deposits in reserves required or permitted by the terms of any contract of the Transit Authority with or for the benefit of holders of its bonds, notes, or other evidences of indebtedness issued for any purpose relating to the Adopted Regional System, other than extensions thereof, two-thirds of such excess revenues shall, at the end of each fiscal year, beginning with the fiscal year in which the Adopted Regional System (exclusive of extensions) is first put into substantially full revenue service, be paid into the Treasury of the United States as miscellaneous receipts.

STUDY OF DULLES AIRPORT EXTENSION

SEC. 7. (a) The Secretary of Transportation is authorized to contract with the Transit Authority for a comprehensive study of the feasibility, including preliminary engineering, of extending a transit line in the median of the Dulles Airport Road from the vicinity of Virginia Route 7 on the I-66 Route of the Adopted Regional System to the Dulles International Airport.

(b) The study to be undertaken pursuant to subsection (a) of this section shall be completed within six months after execution of the contract authorized therein at a cost not in excess of $150,000; and there is authorized to be appropriated not to exceed $150,000 to carry out the purposes of this section.

REPEAL AND AMENDMENT OF EXISTING LAWS

SEC. 8. (a) The following provisions of law are repealed:

(1) The National Capital Transportation Act of 1960 (Public Law 86-669; 74 Stat. 537).

(2) Sections 3 and 4 of the National Capital Transportation Act of 1965 (Public Law 89-173; 79 Stat. 664-665).

(b) Section 5(a) of the National Capital Transportation Act of 1965 is amended by striking out "authorized in section 3 hereof" and inserting in lieu thereof the following: "of the Adopted Regional System (as defined in section 2(1) of the National Capital Transportation Act of 1969)".

Approved December 9, 1969.

Public Law 92-349

AN ACT

To amend the National Capital Transportation Act of 1969 to provide for Federal guarantees of obligations issued by the Washington Metropolitan Area Transit Authority, to authorize an increased contribution by the District of Columbia, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "National Capital Transportation Act of 1972".

TITLE I—FEDERAL GUARANTEES OF WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY OBLIGATIONS

SEC. 101. The National Capital Transportation Act of 1969 is amended by adding at the end thereof the following new sections:

"GUARANTEE OF TRANSIT AUTHORITY OBLIGATIONS

"SEC. 9. (a) The Secretary of Transportation is authorized to guarantee, and to enter into commitments to guarantee, upon such terms and conditions as he may prescribe, payment of principal of and interest on bonds and other evidences of indebtedness (including short-term notes) issued with the approval of the Secretary of the Treasury by the Transit Authority under the Compact. No such guarantee or commitment to guarantee shall be made unless the Secretary of Transportation determines and certifies that—

"(1) the obligation to be guaranteed represents an acceptable financial risk to the United States and the prospective revenues of the Transit Authority (including payments under section 10) furnish reasonable assurance that timely payments of interest on such obligation will be made;

"(2) the Transit Authority has entered into an agreement with the Secretary of Transportation providing for reasonable and prudent action by the Transit Authority respecting its financial condition if at any time the Secretary, in his discretion, determines that such action would be necessary to protect the interest of the United States;

"(3) unless the obligation is a short-term note (as determined by the Secretary), it will be sold through a process of competitive bidding as prescribed by the Secretary of Transportation; and

"(4) the rate of interest payable with respect to such obligation is reasonable in light of prevailing market yields.

Notwithstanding clause (3) of the preceding sentence, the Secretary of Transportation may guarantee an obligation under this section sold through a process of negotiation if he makes a determination that prevailing market conditions would result in a higher net interest cost or would otherwise increase the cost of issuing the obligation if the obligation was sold through the competitive bidding process. The Secretary's determination shall be in writing and shall contain a detailed explanation of the reasons therefor.

"(b) Any guarantee of obligations made by the Secretary of Transportation under this section shall be conclusive evidence of the eligibility of the obligations for such guarantee, and the validity of any guarantee so made shall be incontestable, except for fraud or material misrepresentation, in the hands of a holder of the guaranteed obligation.

"(c) The aggregate principal amount of obligations which may be guaranteed under this section shall not

exceed $1,200,000,000; except that (1) no obligation may be guaranteed under this section if, taking into account the principal amount of that obligation, the aggregate amount of principal of outstanding obligations guaranteed under this section exceeds $900,000,000 unless the local participating governments (A) make, in accordance with agreements entered into with the Transit Authority, capital contributions to the Transit Authority for the Adopted Regional System in a total amount not less than 50 per centum of the amount by which the principal of such obligation causes such aggregate amount of principal to exceed $900,000,000, or (B) have entered into enforceable commitments with the Transit Authority to make such contributions by the end of the fiscal year in which such obligation is issued, and (2) obligations eligible for guarantees under this section which are issued solely for the purpose of refunding existing obligations previously guaranteed under this section may be guaranteed without regard to the $1,200,000,000 limitation.

"(d) The interest on any obligation of the Transit Authority issued after the date of the enactment of this section shall be included in gross income for the purposes of chapter 1 of the Internal Revenue Code of 1954.

"REIMBURSEMENT FOR INTEREST AND RELATED COSTS

"SEC. 10. The Secretary of Transportation shall make periodic payments to the Transit Authority upon request therefor by the Transit Authority in such amounts as may be necessary to equal one-fourth of the total of the—

"(1) net interest cost, and

"(2) fees, commissions, and other costs of issuance, which the Secretary determines the Transit Authority incurred on its obligations issued after the date of the enactment of this section.

"AUTHORIZATION OF APPROPRIATIONS

"SEC. 11. (a) There are authorized to be appropriated to the Secretary of Transportation such amounts as may be necessary to enable him to discharge his responsibilities under guarantees issued by him under section 9 and to make the payments to the Transit Authority in accordance with section 10. Amounts appropriated under this section shall be available without fiscal year limitation.

"(b) If at any time the moneys available to the Secretary of Transportation are insufficient to enable him to discharge his responsibilities under guarantees issued by him under section 9 or to make payments to the Transit Authority in accordance with section 10, he shall issue to the Secretary of the Treasury notes or other obligations in such forms and denominations, bearing such maturities, and subject to such terms and conditions, as may be prescribed by the Secretary of the Treasury. Redemption of such notes or obligations shall be made by the Secretary of Transportation from appropriations available under subsection (a) of this section. Such notes or other obligations shall bear interest at a rate determined by the Secretary of the Treasury, taking into consideration the current average market yield on outstanding marketable obligations of the United States of comparable maturities during the month preceding the issuance of the notes or other obligations. The Secretary of the Treasury shall purchase any notes or other obligations issued hereunder and for that purpose he is authorized to use as a public debt transaction the proceeds from the sale of any securities issued under the Second Liberty Bond Act and the purposes for which securities may be issued under that Act are extended to include any purchase of such notes or obligations. The Secretary of the Treasury may at any time sell any of the notes or other obligations acquired by him under this subsection. All redemptions, purchases, and sales by the Secretary

of the Treasury of such notes or other obligations shall be treated as public debt transactions of the United States.

"OBLIGATIONS AS LAWFUL INVESTMENTS

"SEC. 12. (a) Obligations issued by the Transit Authority which are guaranteed by the Secretary of Transportation under section 9 shall be lawful investments, and may be accepted as security for fiduciary, trust, and public funds, the investment or deposit of which shall be under authority or control of the United States or of any officer or officers thereof, and shall be deemed to be exempt securities within the meaning of laws administered by the Securities and Exchange Commission to the same extent as securities which are issued by the United States.

"(b) The sixth sentence of the paragraph of section 5136 of the Revised Statutes of the United States designated 'Seventh' (12 U.S.C. 24) is amended by inserting ', or obligations of the Washington Metropolitan Area Transit Authority which are guaranteed by the Secretary of Transportation under section 9 of the National Capital Transportation Act of 1969' immediately following 'or general obligations of any State or of any political subdivison thereof'.

"(c) Any building association, building and loan association, or savings and loan association, incorporated or unincorporated, organized and operating under the laws of the District of Columbia, or any Federal savings and loan association, may invest its funds in obligations of the Transit Authority which are guaranteed by the Secretary of Transportation under section 9."

SEC. 102. The Secretary of Transportation shall:

(1) conduct a study to determine the additional funds (if any) needed to bring the facilities and services of the Adopted Regional System into conformity with the national policy respecting the needs of the elderly and the handicapped stated in section 16(a) of the Urban Mass Transportation Act of 1964, and

(2) report to the Congress the results of such study.

TITLE II—INCREASED DISTRICT OF COLUMBIA CONTRIBUTION

SEC. 201. (a) Section 4(a) of the National Capital Transportation Act of 1969 (D.C. Code, sec. 1-1443(a)) is amended (1) by striking out "$216,500,000" and inserting in lieu thereof "$269,700,000", and (2) by striking out "$166,500,000" and inserting in lieu thereof "$219,700,000".

(b) Paragraph (3) of subsection (b) of the first section of the Act of June 6, 1958 (D.C. Code, sec. 9-220(b)(3)) is amended (1) by striking out "$216,500,000" and inserting in lieu thereof "$269,700,000", and (2) by striking out "$166,500,000" and inserting in lieu thereof "$219,700,000".

TITLE III—COMPACT AMENDMENTS

SEC. 301. (a) The Congress hereby consents to amendments to articles I, III, VII, IX, XI, XIV, and XVI of title III of the Washington Metropolitan Area Transit Regulation Compact (D.C. Code, sec. 1-1431 note) substantially as follows:

(1) Section 1(g) of article I is amended to read as follows:

"(g) 'Transit services' means the transportation of persons and their packages and baggage by means of transit facilities between points within the Zone including the transportation of newspapers, express, and mail

between such points, and charter service which originates within the Zone but does not include taxicab service or individual-ticket-sales sightseeing operations; and".

(2) Section 5(a) of article III is amended to read as follows:

"5. (a) The Authority shall be governed by a Board of six Directors consisting of two Directors for each signatory. For Virginia, the Directors shall be appointed by the Northern Virginia Transportation Commission; for the District of Columbia by the City Council of the District of Columbia from among its members, the Commissioner and the Assistant to the Commissioner of the District of Columbia; and for Maryland, by the Washington Suburban Transit Commission. In each instance the Director shall be appointed from among the members of the appointing body, except as otherwise provided herein, and shall serve for a term coincident with his term on the body by which he was appointed. A director may be removed or suspended from office only as provided by the law of the signatory from which he was appointed. The appointing authorities shall also appoint an alternate for each Director, who may act only in the absence of the Director for whom he has been appointed an alternate, except that, in the case of the District of Columbia where only one Director and his alternate are present, such alternate may act on behalf of the absent Director. Each alternate shall serve at the pleasure of the appointing authority. In the event of a vacancy in the office of Director or alternate, it shall be filled in the same manner as an original appointment."

(3) Section 21 of article VII is amended to read as follows:

"Temporary Borrowing

"21. The Board may borrow, in anticipation of receipts, from any signatory, the Washington Suburban Transit District, the Northern Virginia Transportation District or any component government thereof, or from

any lending institution for any purposes of this title, including administrative expenses. Such loans shall be for a term not to exceed two years and at such rates of interest as shall be acceptable to the Board. The signatories and any such political subdivision or agency may, in its discretion, make such loans from any available money."

(4) Section 35 of article IX is amended to read as follows:

"Interest

"35. Bonds shall bear interest at such rate or rates as may be determined by the Board, payable annually or semiannually."

(5) Section 39 of article IX is amended to read as follows:

"Sale

"39. The Board may fix terms and conditions for the sale or other disposition of any authorized issue of bonds. The Board may sell bonds at less than their par or face value but no issue of bonds may be sold at an aggregate price below the par or face value thereof if such sale would result in a net interest cost to the Authority calculated upon the entire issue so sold in excess of the applicable rate determined by the Board, payable semiannually, computed with relation to the absolute maturity of the bonds according to standard tables of bond values, deducting the amount of any premium to be paid on the redemption of any bonds prior to maturity. All bonds issued and sold pursuant to this title may be sold in such manner, either at public or private sale, as the Board shall determine."

(6) Section 51 of article XI is amended to read as follows:

"Operation by Contract or Lease

"51. Any facilities and properties owned or controlled by the Authority may be operated by the Authority di-

rectly or by others pursuant to contract or lease as the Board may determine."

(7) Section 66 of article XIV is amended to read as follows:

"Operations

"66. (a) The rights, benefits, and other employee protective conditions and remedies of section 13(c) of the Urban Mass Transportation Act of 1964, as amended (49 U.S.C. 1609(c)), as determined by the Secretary of Labor shall apply to the operation by the Washington Metropolitan Area Transit Authority of any mass transit facilities owned or controlled by it and to any contract or other arrangement for the operation of transit facilities. Whenever the Authority shall operate any transit facility or enter into any contractual or other arrangements for the operation of such transit facility the Authority shall extend to employees of affected mass transportation systems first opportunity for transfer and appointment as employees of the Authority in accordance with seniority, in any nonsupervisory job in respect to such operations for which they can qualify after a reasonable training period. Such employment shall not result in any worsening of the employee's position in his former employment nor any loss of wages, hours, working conditions, seniority, fringe benefits and rights and privileges pertaining thereto.

"(b) The Authority shall deal with and enter into written contracts with employees as defined in section 152 of title 29, United States Code, through accredited representatives of such employees or representatives of any labor organization authorized to act for such employees concerning wages, salaries, hours, working conditions, and pension or retirement provisions.

"(c) In case of any labor dispute involving the Authority and such employees where collective bargaining does

not result in agreement, the Authority shall submit such dispute to arbitration by a board composed of three persons, one appointed by the Authority, one appointed by the labor organization representing the employees, and a third member to be agreed upon by the labor organization and the Authority. The member agreed upon by the labor organization and the Authority shall act as chairman of the board. The determination of the majority of the board of arbitration, thus established shall be final and binding on all matters in dispute. If after a period of ten days from the date of the appointment of the two arbitrators representing the Authority and the labor organization, the third arbitrator has not been selected, then either arbitrator may request the Federal Mediation and Conciliation Service to furnish a list of five persons from which the third arbitrator shall be selected. The arbitrators appointed by the Authority and the labor organization, promptly after the receipt of such list shall determine by lot the order of elimination, and thereafter each shall in that order alternately eliminate one name until only one name remains. The remaining person on the list shall be the third arbitrator. The term 'labor dispute' shall be broadly construed and shall include any controversy concerning wages, salaries, hours, working conditions, or benefits including health and welfare, sick leave, insurance or pension or retirement provisions but not limited thereto, and including any controversy concerning any differences or questions that may arise between the parties including but not limited to the making or maintaining of collective bargaining agreements, the terms to be included in such agreements, and the interpretation, or application of such collective bargaining agreements and any grievance that may arise and questions concerning representation. Each party shall pay one-half of the expenses of such arbitration.

"(d) The Authority is hereby authorized and empowered to establish and maintain a system of pensions and

retirement benefits for such officers and employees of the Authority as may be designated or described by resolution of the Authority; to fix the terms of and restrictions on admission to such system and the classifications therein; to provide that persons eligible for admission in such pension system shall not be eligible for admission to, or receive any benefits from, any other pension system (except social security benefits), which is financed or funded, in whole or in part, directly or indirectly by funds paid or appropriated by the Authority to such other pension system, and to provide in connection with such pension system, a system of benefits payable to the beneficiaries and dependents of any participant in such pension system after the death of such participant (whether accidental or otherwise, whether occurring in the actual performance of duty or otherwise, or both) subject to such exceptions, conditions, restrictions and classifications as may be provided by resolution of the Authority. Such pension system shall be financed or funded by such means and in such manner as may be determined by the Authority to be economically feasible. Unless the Authority shall otherwise determine, no officer or employee of the Authority and no beneficiary or dependent of any such officer or employee shall be eligible to receive any pension or retirement or other benefits both from or under any such pension system and from or under any pension or retirement system established by an acquired transportation system or established or provided for, by or under the provisions of any collective bargaining agreement between the Authority and the representatives of its employees.

"(e) Whenever the Authority acquires existing transit facilities from a public or privately owned utility either in proceeding by eminent domain or otherwise, the Authority shall assume and observe all existing labor contracts and pension obligations. When the Authority acquires an existing transportation system, all employees who are necessary for the operation thereof by the Authority shall be transferred to and appointed as employees of the Authority, subject to all the rights and benefits of this title. These employees shall be given seniority credit and sick leave, vacation, insurance and pension credits in accordance with the records or labor agreements from the acquired transportation system. Members and beneficiaries of any pension or retirement system or other benefits established by the acquired transportation system shall continue to have rights, privileges, benefits, obligations and status with respect to such established system. The Authority shall assume the obligations of any transportation system acquired by it with regard to wages, salaries, hours, working conditions, sick leave, health and welfare and pension or retirement provisions for employees. It shall assume the provisions of any collective bargaining agreement between such acquired transportation system and the representatives of its employees. The Authority and the employees, through their representatives for collective bargaining purposes, shall take whatever action may be necessary to have pension trust funds presently under the joint control of the acquired transportation system and the participating employees through their representative transferred to the trust fund to be established, maintained and administered jointly by the Authority and the participating employees through their representatives. No employee of any acquired transportation system who is transferred to a position with the Authority shall by reason of such transfer be placed in any worse position with respect to workmen's compensation, pension, seniority, wages, sick leave, vacation, health and welfare insurance or any other benefits, than he enjoyed as an employee of such acquired transportation system."

(8) Section 79 of article XVI is amended to read as follows:

"Reduced Fares

"79. The District of Columbia, the Northern Virginia Transportation District, the Washington Suburban Transit District and the component governments thereof, may enter into contracts or agreements with the Authority to make equitable payments for fares lower than those established by the Authority pursuant to the provisions of article XIII hereof for any specified class or category of riders."

(b) The Commissioner of the District of Columbia is authorized and directed to enter into and execute on behalf of the District of Columbia amendments, substantially as set forth in subsection (a), to title III of the Washington Metropolitan Area Transit Regulation Compact with the States of Virginia and Maryland.

Approved July 13, 1972.

Public Law 92-517

AN ACT

To provide for acquisition by the Washington Metropolitan Area Transit Authority of the mass transit bus systems engaged in scheduled regular route operations in the National Capital area, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SECTION 1. This Act may be cited as "National Capital Area Transit Act of 1972".

STATEMENT OF FINDINGS AND PURPOSES

SEC. 2. The Congress finds that (1) an adequate and economically sound transportation system or systems, including bus and rail rapid transit, serving the Washington metropolitan area is essential to commerce among the several States, and among such States and the District of Columbia, and to the health, welfare, and safety of the public; (2) economies and improvement of service will result from the unification of bus transit and rail transit operations as well as from integration of bus transit facilities within the Washington metropolitan area; (3) the Washington Metropolitan Area Transit Authority is a body corporate and politic organized pursuant to interstate compact among the States of Maryland and Virginia and the District of Columbia, with the consent of Congress, to plan, develop, finance, and operate improved transit facilities in the Washington metropolitan area transit zone; (4) an appropriate solution to the current bus transportation emergency is public ownership and operation of bus transit facilities within the Washington metropolitan area; (5) the cost of such public ownership should be shared by the Federal and local governments in the Washington metropolitan area in accord-

ance with the matching formula authorized by the Urban Mass Transportation Act of 1964 (49 U.S.C. 1601-1612); and (6) to these ends it is necessary to enact the provisions hereinafter set forth.

TITLE I

CONSENT TO COMPACT AMENDMENT

SEC. 101. (a) The Congress hereby consents to amendments to articles XII and XVI of title III of the Washington Metropolitan Area Transit Regulation Compact (D.C. Code, sec. 1-1431 note) substantially as follows:

(1) Section 56 of article XII is amended by adding at the end thereof the following new paragraph:

"(e) The Authority may acquire the capital stock or transit facilities of any private transit company and may perform transit service, including service by bus or similar motor vehicle, with transit facilities so acquired, or with transit facilities acquired pursuant to article VII, section 20. Upon acquisition of the capital stock or the transit facilities of any private transit company, the Authority shall undertake the acquisition as soon as possible of the capital stock or the transit facilities of each of the other private transit companies within the zone requesting such acquisition. Lack of such request, however, shall not be construed to preclude the Authority from acquiring the capital stock or the transit facilities of any such company pursuant to section 82 of article XVI."

(2) Subsection (a) of section 82 of article XVI is amended by deleting "or by a private transit company" at the end of such subsection and by inserting in lieu thereof the following: "whenever such property cannot be acquired by negotiated purchase at a price satisfactory to the Authority".

(b) The Commissioner of the District of Columbia is authorized and directed to enter into and execute on behalf of the District of Columbia amendments, substantially as set forth above, to title III of the Washington Metropolitan Area Transit Regulation Compact with the States of Virginia and Maryland.

ACQUISITION OF PRIVATE BUS COMPANIES OPERATING WITHIN THE WASHINGTON METROPOLITAN AREA

SEC. 102. (a) Based on the findings set forth in section 2 of this Act, it is the sense of the Congress that the Washington Metropolitan Area Transit Authority (hereafter in this Act referred to as the "Transit Authority") should initiate negotiations as soon as possible with the ownership of D.C. Transit System, Incorporated (and its subsidiary, the Washington, Virginia, and Maryland Coach Company), the Alexandria, Barcroft, and Washington Transit Company, and the WMA Transit Company for acquisition by the Transit Authority of capital stock or facilities, plant, equipment, real and personal property of such bus companies of whatever nature, whether owned directly or indirectly, used or useful for mass transportation by bus of passengers within the Washington metropolitan area. It is further the sense of the Congress that representatives of the Transit Authority should participate in any labor contract negotiations undertaken prior to acquisition by the Transit Authority of such bus companies.

(b) The franchise to operate a system of mass transportation of passengers for hire granted to D.C. Transit System, Incorporated, by the Act of July 24, 1956 (70 Stat. 598) is hereby canceled, effective upon the date immediately preceding the date on which the Transit Authority acquires the transit facilities of D.C. Transit System, Incorporated.

(c) (1) The Transit Authority, and any transit company owned or controlled by the Transit Authority, may operate charter service by bus in accordance with title III of the Washington Metropolitan Area Transit Regulation Compact only between any point within the transit zone and any point in the State of Maryland or Virginia, or a point within 250 miles of the Zero Mile Stone located on the Ellipse.

(2) For the purposes of this subsection, the term "transit zone" means the area designated in section 3 of title III of the Washington Metropolitan Area Transit Regulation Compact.

(d) D.C. Transit System, Incorporated, a corporation of the District of Columbia, may—

(1) continue to exist as such a corporation and amend its charter in any manner provided under the laws of the District of Columbia;

(2) avail itself of the provisions of the District of Columbia Business Corporation Act in respect to a change of its name; and

(3) become incorporated or reincorporated in any manner provided under the laws of the District of Columbia.

Nothing in this Act shall be construed so as to cause or require the corporate dissolution of D.C. Transit System, Incorporated.

TITLE II

DISTRICT OF COLUMBIA AUTHORIZATIONS

SEC. 201. (a) The Commissioner of the District of Columbia is authorized to contract with the Transit Authority for payment to it of the District's share of the cost to the Transit Authority of acquiring—

(1) the private bus companies referred to in section 102(a) of this Act; and

(2) any rolling stock, real estate, or other capital resources required for the operation of bus service in the District of Columbia either at the time of acquisition of such bus companies or at some future time.

(b) Subsection (b) of the first section of the Act of June 6, 1958 (D.C. Code, sec. 9-220) (relating to the borrowing authority of the District of Columbia), is amended by adding at the end thereof the following new paragraph:

"(5) Loans may be made under this subsection to carry out the purposes of section 210(a) of the National Capital Area Transit Act of 1972."

TITLE III

FINANCING

SEC. 301. The Transit Authority, for the purpose of effecting the acquisition of the mass transit bus system or systems as contemplated by this Act, together with such improvements or replacement of acquired equipment and facilities as may be found necessary or desirable by the Secretary of Transportation (hereafter in this title referred to as the "Secretary") in conjunction with such acquisition and within a reasonable time thereafter, not to exceed six months, is eligible for capital grant assistance pursuant to section 3 of the Urban Mass Transportation Act of 1964. For this purpose, the Transit Authority shall be considered a "local public body" within the meaning of that section and, accordingly, the Secretary may authorize and approve capital grant assistance to the Transit Authority in the maximum amount provided for in the Urban Mass Transportation Act of 1964

toward the cost of acquisition of such bus system or systems, including the cost of improvements to or replacement of acquired equipment and facilities approved by the Secretary in conjunction with such acquisition. Such assistance shall be provided from funds available to the Urban Mass Transportation Administration of the Department of Transportation.

SEC. 302. (a) If the Secretary should determine that immediate action is urgently required to protect the public interest in the National Capital area, he may waive any or all provisions of the Urban Mass Transportation Act of 1964 (except section 13(c) thereof), and immediately grant to the Transit Authority from funds available to the Urban Mass Transportation Administration of the Department of Transportation such sums as are contemplated under section 301.

(b) The Secretary, after determining that immediate action is necessary in the public interest in accordance with subsection (a) of this section, may, in accordance with subsection (c) of this section, advance from funds available to the Urban Mass Transportation Administration of the Department of Transportation such funds as he determines to be necessary for payment to the Transit Authority to provide temporary financing for that portion of the cost of acquisition of the mass transit bus system or systems contemplated by this Act, together with associated improvements to or replacement of acquired equipment and facilities, which are not provided for by the Secretary pursuant to section 301 of this Act. For this purpose, such advance shall not be construed as a loan made under section 3 of the Urban Mass Transportation Act of 1964. Funds advanced pursuant to this section shall be considered as "other than Federal funds" within the meaning of section 4(a) of the Urban Mass Transportation Act of 1964.

(c) The Secretary shall not advance funds under this section until he has determined that the Transit Authority has the capacity and ability to arrange for repayment of such advance in accordance with section 303 of this Act.

SEC. 303. The advance authorized under section 302 (b) shall be repaid by the Transit Authority to the Urban Mass Transportation Administration of the Department of Transportation from contributions by the District of Columbia and other local government jurisdictions or from other non-Federal sources as may be available to the Transit Authority and which were not estimated to be available for financing the mass transit rail rapid system authorized by the National Capital Transportation Act of 1969. Repayment of such advance may be deferred by the Secretary of Transportation, at the request of the Transit Authority, but not beyond the end of the fiscal year following the fiscal year in which the advance was made. Repayment shall be made with interest at a rate to be determined by the Secretary of the Treasury calculated in accordance with the formula set forth in section 3(c) of the Urban Mass Transportation Act of 1964. Principal and interest repaid pursuant to this section shall be credited to the Urban Mass Transportation Fund and shall be considered a restoration of obligational authority available to the Secretary under section 4(c) of the Urban Mass Transportation Act of 1964.

TITLE IV

SEC. 401. (a) The United States District Court for the District of Columbia shall have complete and exclusive jurisdiction over any proceedings by the Transit Authority for the condemnation of property, wherever situated, of D.C. Transit System, Incorporated (including its subsidiary, the Washington, Virginia, and Maryland Coach Company), the Alexandria, Barcroft, and

Washington Transit Company, and the WMA Transit Company. Such proceedings shall be instituted and maintained in accordance with the provisions of this section and the provisions of subchapter IV of chapter 13 of title 16, District of Columbia Code, except that the court may appoint a commission in accordance with rule 71A (h) of the Federal Rules of Civil Procedure in connection with the issue of compensation arising out of any such proceedings.

(b) Any such condemnation proceedings shall be commenced by the Attorney General of the United States, upon the request of the Transit Authority, by filing with the United States District Court for the District of Columbia a complaint and declaration of taking containing a description of the land and other assets to be taken, together with a sum of money deposited with the registrar of such court in accordance with the applicable provisions of law set forth in subsection (a) of this section. Upon such filing and deposit, title to the possession of the assets described in any such complaint and declaration of taking shall pass to the Transit Authority and the value of the assest so acquired shall be determined as of that date.

(c) The trial of any such condemnation proceedings shall be a preferred cause and shall be commenced at the earliest date convenient to the court.

(d) Any proceeding brought by the Transit Authority under this section against the Alexandria, Barcroft, and Washington Transit Company shall be transferred, upon motion made by such Transit Company, to the United States District Court for the Eastern District of Virginia, and such district court shall have, upon such transfer, complete and exclusive jurisdiction over such proceeding. Any action brought by the Transit Authority under this section against the WMA Transit Company, shall be transferred, upon motion made by the WMA

Transit Company, to the United States District Court for the District of Maryland, and such district court shall have, upon such transfer, complete and exclusive jurisdiction over such proceeding.

TITLE V

AUDIT AND REVIEW

SEC. 501. The Comptroller General of the United States shall have access to all books, records, papers, and accounts and operations of the Transit Authority, and any company with which the Transit Authority is conducting negotiations under this Act, and any company eligible to receive or receiving any funds authorized by this Act. The Comptroller General is authorized to inspect any facility or real or personal property of the Transit Authority or of such companies.

TITLE VI

ARLINGTON CEMETERY AND SMITHSONIAN STATIONS

SEC. 601. The National Capital Transportation Act of 1969, approved December 9, 1969 (83 Stat. 320) as amended, is hereby further amended by adding at the end thereof the following new section:

"SEC. 13. (a) The Secretary of Transportation shall make payments to the Transit Authority in such amounts as may be requisitioned from time to time by the Transit Authority sufficient, in the aggregate, to finance the cost of designing, constructing, and equipping (1) a rail rapid transit station partially under Memorial Drive designed to serve the Arlington Cemetery with two entrances surfacing adjacent to the sidewalks north and south of Memorial Drive and east of Jefferson Davis Highway, and (2) an additional entrance in the vicinity of the northeast end of the Smithsonian Station surfac-

ing on the Mall south of Adams Drive; except that the aggregate amount of such payments shall not exceed $7,385,000.

"(b) There are authorized to be appropriated to the Secretary of Transportation, without fiscal year limitation, not to exceed $7,385,000 to carry out the purposes of this section. The appropriations authorized in this subsection shall not be subject to the provisions of this Act requiring contributions by the local governments and shall be in addition to the appropriations authorized by section 3(c) thereof."

Approved October 21, 1972.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-958

CITY OF FAIRFAX, VIRGINIA
Petitioner,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, *et. al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

QUESTIONS PRESENTED

The central issue in this case is whether there has been an anticipatory breach of the Capital Contributions Agreement by the respondents. The questions as presented in the Petition do not clearly raise that issue. Question No. 1, as set forth in the Petition, avoids this issue by assuming a breach of contract and focusing instead on the consequences of a breach. Similarly, ques-

tion No. 2 obfuscates this central issue by focusing on provisions which do not go to the essence of the contract.

The determination of whether there has been an anticipatory breach is governed by the common law of contracts and presents the following questions:

1. Whether the Court of Appeals was correct in holding that the common law doctrine of anticipatory breach of contract, upon which petitioner has relied throughout this litigation, requires a showing of an unequivocal refusal to perform the essence of the contract and that the refusal must be of such substantial character as to defeat the object of the parties in making the contract.

2. Whether the Court of Appeals correctly held that there has been no anticipatory breach or repudiation of the Capital Contributions Agreement since construction of the K Route was the consideration the petitioner bargained for in that Agreement, and there has been no repudiation of the commitment to construct the K Route, which is still part of the planned Metrorail system.

3. Whether the Court of Appeals correctly held that petitioner was not entitled to restitution of its entire contribution to the Metrorail system since petitioner does not contend that there has been a repudiation of the basic objective of the contract and now relies on nothing more than alleged breaches of subsidiary provisions of the Capital Contributions Agreement from which absolutely no harm flowed.

STATEMENT OF THE CASE

The facts of the case are stated fully and accurately in the decision of the Court of Appeals (Pet. App. 1a-28a),[1]

[1] Petitioner's Appendix is referred to as (Pet. App.). The Petition for a Writ of Certiorari is referred to as (Pet.). The Joint Appendix is referred to as (A.). The Exhibit Volume of the Joint Appendix is referred to as (A. Exh.).

and will be referred to only as necessary to provide the factual basis for the Court of Appeals' decision.[2]

This case involves petitioner's contention that the respondents have committed an anticipatory breach of the Capital Contributions Agrement of 1970 (A. Exh. 306-24). That Agreement, executed by all of the parties to this action, provided the local share of the initial $2.5 billion in federal and local funds for construction of Metrorail, the one hundred mile rail rapid transit system for the Washington, D.C. area. Petitioner contributed approximately $2 million toward construction of the Metrorail system.

Petitioner's object in executing the Capital Contributions Agreement was to secure the construction of the K Route running from Rosslyn to Vienna near the petitioner's border. This single goal is illustrated by petitioner's complaint demanding in the alternative either a mandatory injunction ordering the completion of the K Route or damages in the amount of its entire contribution to the project (Amended Complaint; Pet. App. 17a). Petitioner's counsel argued to the District Court that,

> [W]hat the City of Fairfax bargained for and bought with its $2 million, was the Nutley Road station [now referred to as the Vienna Station]. They didn't bargain for ridership. They didn't bargain for a piece of the hundred mile system or access but they wanted what they bargained for and what they insisted was that they have the right to have that Nutley Station for their money . . . Your Honor, well that benefit has been taken from them as the Court has found. It has been, then they're entitled to their money back. They're entitled to restitution

[2] Many of the facts alleged throughout the Petition are incorrect and unsupported by the record. Rather than burden this Court with a detailed list of these factual errors, we refer this Court to the decision of the Court of Appeals.

from the bargain which they bought. (Hearing on Damages, R. 258).

Petitioner's City Manager underscored how completely its case depends on the fate of the K Route. At his deposition as petitioner's Rule 30(b)(6) representative, he testified as follows:

> Q. Assuming that the Nutley Road Station [now referred to as the Vienna Station] could be built by, say, between 1982 and 1984, would Metro have complied with its obligations under the Capital Contributions Agreement of 1970?
>
> A. In my opinion, yes, sir. (A. 122; Pet. App. 17a).

In fact, the bulk of petitioner's efforts in the District Court were directed toward proving that the K Route would never be completed, and that this constituted the breach of the Capital Contributions Agreement.

By 1976 the projected cost of completing construction of the Metrorail system had increased to approximately $5 billion. The $2.5 billion made available under the 1970 Capital Contributions Agreement was not enough to complete any of the K Route. Accordingly, an interim finance plan providing additional local and federal funds was implemented. The local share of these funds is obligated under the Interim Capital Contributions Agreement (A. Exh. 228-6). This interim finance plan will enable the Washington Metropolitan Area Transit Authority ("WMATA") to complete 60 miles of the 100 mile system. It funds the K Route to Glebe Road, along with practically all of the Metrorail construction which was not held up for one reason or another, such as I-66 delays (Pet. App. 9a, 26a-27a) or Alternative Analysis (Pet. App. 9a, 22a, 25a, 27a).

Funding of the K Route west of Glebe Road was not included in the interim plan because it was planned to be constructed in the median of I-66, and construction

of I-66 was enjoined until well after this litigation was commenced (Pet. App. 9a, 26a-27a; A. 98, 119, 199-200, 204-5, 211, 337-8, 343-4, 724, 751). This inability to begin construction on the K Route west of Glebe Road precluded its federal funding in 1976.[3]

Before the District Court, petitioner contended that, since the Interim Capital Contributions Agreement did not provide funds for the construction of the K Route beyond Glebe Road, the respondents had determined that Route K should not be built and, accordingly, had committed an anticipatory breach of the Capital Contributions Agreement. The District Court agreed:

> The breach in this case occurred when WMATA approved the interim capital contributions agreement on December 2, 1976. That amendment terminated the K Route at Glebe Road in Arlington—a substantial reduction in facilities serving the City of Fairfax. (Pet. App. 46a).

Based on this finding of a total breach of contract, the District Court awarded restitution of petitioner's entire $2 million contribution to the Metrorail system plus interest from December 2, 1976 (Pet. App. 46a-47a).

---

[3] In the development of guidelines and requirements for funding the federal contribution to Metro construction, the Urban Mass Transportation Administration ("UMTA") imposed an operable segment policy on WMATA which prohibited funding segments of the system which could not be completed to operation. Under this policy the Federal Government would fund construction of only those portions of the system which were contiguous to operating portions and which could be made operational in the near future (A. 326, 329-31, 344, 694-5). Because the I-66 litigation inhibited beginning construction of the K Route, that route was not an operable segment and could not be included in the UMTA funding packages (A. 314-5, 344, 724). With federal funding thus unavailable for the outer half of the K Route, only the inner half could be included in the interim financial plan (A. 170).

After a careful review of the evidence, the Court of Appeals found that rather than "terminating" the K Route,

> . . . [T]he defendants have aggressively pressed on with plans for the construction of the system along K Route beyond Glebe Road. They have completed alternatives analysis study and have reaffirmed their commitment to the completion of the K Route. They are even now engaged in the preparation of a contribution and construction schedule for the project. The defendants are confident that within the time provided for completion of the system Route K beyond Glebe Road will be constructed (Pet. App. 27a).

The petitioner no longer contends that the respondents have eliminated the K Route from the Metrorail system. It abandoned this contention in its brief to the Court of Appeals, where it stated that ". . . the K Route remains a part of ARS-68 (Revised)", and even argued that the District Court did not find a truncation of the K Route (Appellee's Brief, 27, 21-2, 26, 30; Pet. App. 23a).

The Petition apparently does not attempt to revive the initial claim that the K Route has been eliminated from the system. Rather, petitioner relies in this Court, as it did in the Court of Appeals, on three of its subsidiary allegations of breach of contract: (1) that the respondents have delayed completion of the K Route relative to other routes in the Metrorail system (Pet. 21-22, 26-27); (2) that WMATA deferred making the recomputation called for in paragraph 3.3 of the Capital Contributions Agreement (Pet. 13-17, 22-23); and (3) that, even though "the K Route remains a part of ARS-68 (Revised)", the respondents have repudiated an intention to construct the K Route "pursuant to the terms" of the Capital Contributions Agreement (Pet. 20). No evidence of harm flowing from any of these alleged breaches was presented. Petitioner's evidence of damages was

limited to a showing of the amounts and dates of its contributions, along with testimony directed toward minimizing the benefit it would receive from a Metrorail system without the K Route (Hearing on Damages, R. 14-15, 17-22, 172-181).

Applying traditional concepts of contract law, the Court of Appeals found that none of these allegations amounted to the total repudiation of the contract required to support a finding of anticipatory breach (Pet. App. 23a-27a, nt. 20, 23a). The Court of Appeals characterized petitioner's position as:

> [N]o more than an argument that, if one party to a contract violates any provision of a contract, whatever its materiality, such violation will represent an anticipatory breach, giving the other party the right to recover damages for breach of the entire contract. (Pet. App. 23a).

Accordingly, the Court of Appeals dismissed petitioner's action as premature. (Pet. App. 28a).

ARGUMENT

None of the special and important reasons which would warrant review on certiorari are present in this case. There is no federal question involved, no constitutional issue, and no conflict with the decision of another Court of Appeals. There is no basis for petitioner's contention that the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. The only questions the petitioner has presented for review are whether the Court of Appeals interpreted and applied a common law contract doctrine in conflict with pre-*Erie* decisions of this Court. Even if these issues were worthy of consideration by this Court, the record in this case shows that the Court of Appeals correctly interpreted the

common law doctrine of anticipatory breach of contract, and correctly applied that doctrine to the evidence presented in the District Court.

I. The Common Law Doctrine of Anticipatory Breach of Contract was Interpreted In Accordance with Established State Law and Pre-Erie Decisions of this Court.

Petitioner claims that the decision below conflicts with the reasoning in several contract cases decided by this Court prior to *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938) (Pet. 18). There is no such conflict. In the course of a lucid and thorough analysis of numerous federal, state and other authorities, the Court of Appeals emphasized the two basic, time-honored elements of the anticipatory breach doctrine. First, it must be shown that the defendant unequivocally and unconditionally refused, in advance, to perform the contract at the time set for his performance (Pet. App. 11a-15a). Second, there must be a repudiation of the very essence of the contract: "the breach must be 'so material and substantial in nature that it affects the very essence of the contract and serves to defeat the object of the parties'" (Pet. App. 15a).

Petitioner ineffectually attacks this recitation of standard black-letter law. Petitioner asserts that the Court of Appeals misinterpreted this Court's decision in *Dingley* v. *Oler*, 117 U.S. 490 (1886) "in a manner which vitiates the doctrine of anticipatory breach," and establishes "a rule of law that repudiation of a contract must deny the intention to perform at 'any time'" (Pet. 18). Contrary to this assertion, the Court of Appeals did not disregard time of performance, but clearly stated that the doctrine calls for a refusal on the part of the defendant to perform "at the time set for his performance" (Pet. App. 12a). In reversing the judgment of the District Court, the Court of Appeals dismissed the action as premature

without prejudice to petitioner's right to bring such other actions as may be appropriate "if it develops that the defendants have unequivocally abandoned hope of constructing Route K beyond Glebe Road, as provided in the 1970 Agreement, or if Route K is not completed within the time fixed for the completion of the system in the 1970 Agreement. . ." (Pet. App. 28a).

Having abandoned before the Court of Appeals its original contention, on which the litigation was based, that respondents had eliminated the K Route from the Metrorail System, petitioner urged that the failure of WMATA to make the recomputations provided for in the Capital Contributions Agreement constituted an anticipatory breach of that Agreement. The Court of Appeals held that for a number of reasons, including the unavailability in 1974 of supplemental federal funding, it would "have been an entirely futile exercise" to make the recomputation (Pet. App. 24a-25a). Accordingly, the Court held that the failure to make the recomputation "was immaterial, so far as the accomplishment of the objective of that Agreement was concerned" and could not constitute a breach of such substantial character as to defeat the object of the parties in making the contract (Pet. App. 24a).

Petitioner challenges this well-documented and well-reasoned conclusion of the Court of Appeals with the bare, unsupported, and unsupportable assertion that failure to make the recomputation has rendered impossible performance of the Capital Contributions Agreement (Pet. 23). Quite apart from its lack of merit, petitioner's disagreement with the finding of the Court of Appeals that the failure to make the recomputation was not substantial or material does not merit the exercise of certiorari jurisdiction.

Petitioner, in an effort to elevate the recomputation issue to a basis for granting certiorari, contends that the

Court's ruling somehow creates a new doctrine which unsettles contractual relations and has a chilling effect upon federally assisted transit and other local public projects (Pet. 13-17). In so contending, petitioner misconstrues the ruling of the Court. That ruling held that the unavailability of federal funds simply made the recomputation a futile exercise at the time, but was immaterial so far as the accomplishment of the objective of the Capital Contributions Agreement was concerned. (Pet. App. 24a-25a).

As an example of the chilling effect created by the Court of Appeals' ruling, the petitioner states, ". . . the most graphic demonstration of the decision below is the financial crisis which struck the City of New York [in 1975]" (Pet. 16). At that time New York was on the verge of defaulting on $2.5 billion in short-term obligations, but managed to avoid default with federal assistance. Petitioner argues that if federal assistance had not been forthcoming and New York had defaulted, the application of the "doctrine created in the decision below" would have "excused" the default, leaving the creditors unpaid (Pet. 17).

The crucial difference between New York's potential default and the default petitioner alleges here illustrates the fundamental defect in petitioner's case. New York's breach would have been material: it would have vitiated the object of the contracts of its creditors, and their claims for payment would have been recognized. Petitioner, on the other hand, has failed to prove a material breach. Its contention in the Court of Appeals and now in its Petition is that it is entitled to a refund even though it has not been harmed by any of the supposed breaches to which it points. Even though it will benefit from the construction of the K Route, it would also like its money back. In effect, petitioner is demanding $2 million in nominal damages. The reasoning of the Court

of Appeals in denying this demand is entirely consistent with the pre-*Erie* contract decisions of this Court.

II. Petitioner's Contention That The Decision Below Does Not Conform To Accepted Standards of Judicial Review Is Without Merit.

Petitioner asserts that the Court of Appeals made "two factual conclusions which were plainly wrong and which conflicted with the findings of the District Court," and that these errors represent such a departure from accepted standards of review that the supervisory powers of this Court should be exercised (Pet. 23-28). Even if it were appropriate to grant certiorari solely to review the factual conclusions of the Court below, there is no basis for such a review in this case. The District Court's finding of an anticipatory breach of contract was reversed on the grounds that it was clearly erroneous because there is no evidence in the record of such a breach. There has been no repudiation of the object of the Capital Contributions Agreement: the construction of the 100 mile Metrorail system, including the K Route to Vienna. In fact, all of the respondents are aggressively pressing forward with plans for the financing and construction of the entire system.

Petitioner's alleged "erroneous factual conclusions" are frivolous and immaterial. The first of these is an allegation that the Court below failed to recognize that the K Route was not included in UMTA's original demand for Alternatives Analysis, but rather was added later at the respondents' request (Pet. 24-26). However, the Alternative Analyses studies reaffirmed the respondents' intention of constructing the K Route, and thus certainly cannot constitute evidence of an anticipatory breach of the Agreement. Petitioner's contention that the injunction against construction of I-66 did not constitute an impediment to construction of the K Route (Pet. 26-27)

plainly lacks merit. The Court of Appeals correctly found that there is complete integration of the two projects, and construction of the K Route could not proceed in the median of I-66 while that project was in doubt (Pet. App. 26a).

Petitioner's rights have been preserved. In the event that there is an actionable breach of the Capital Contributions Agreement in the future, petitioner is free to bring such other actions as may then be appropriate (Pet. App. 28a).

CONCLUSION

For the reasons set forth above, the petition for certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of January, 1979, three copies of the foregoing Respondent's Brief In Opposition were mailed, postage prepaid, to John H. Rust, Jr., Rust, Rust and Pratt, 4009 Chain Bridge Road, P.O. Box 537, Fairfax, Virginia 22030, counsel for petitioner.

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